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Supreme Court, U.S.
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In The
Supreme Court of the United States

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JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

1. Whether granting standing to litigate a Dormant Commerce Clause claim to a party not impacted by the provisions of a state enactment inappropriately diminishes or eliminates the standing requirements articulated by decisions of this Court?

2. Is the Dormant Commerce Clause violated by Article XII, Section 8 of the Nebraska Constitution which applies equally to all corporations conducting business in Nebraska and has only incidental effects on interstate commerce?

3. When the highest court of a state has recognized the concept of severability in state enactments, is it appropriate for a federal court to overturn an entire state enactment when only a severable portion of that enactment has been found to violate our federal constitution?

4. When facts are in dispute and a Circuit Court must weigh evidence presented by the parties, is summary judgment appropriate under the standards articulated by this Court?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

> Petitioners, who were the Appellants in the appeals court, are Secretary of State John Gale, in his official capacity, and Attorney General Jon Bruning, in his official capacity. Respondents, who were the Appellees in the appeals court are Jim Jones, Terrence M. Shumacher, Shad Dahlgren, Todd Ehler and Robert E. Beck III.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners or Respondents to this case is a corporation or other syndicate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The opinion of the Eight Circuit Court of Appeals is reported at 470 F.3d 1261 (8th Cir. 2006). (App. 1-18). The opinion of the United States District Court, District of Nebraska is reported at 405 F.Supp.2d 1066 (D.Neb. 2005). (App. 19-58).

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JURISDICTION

The Eighth Circuit Court of Appeals entered its opinion and judgment on December 13, 2006. (App. 1-18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

> The Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . . "

U.S.C.A. Const. Art. I § 8, cl. 3.

> No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used

> for farming or ranching in this state, or engage in farming or ranching. . . . These restrictions shall not apply to (A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch. . . .

Neb. Const. Art. XII, § 8. The full text of Initiative 300 is set forth *infra*, App. 59-63.

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STATEMENT OF THE CASE

The State Enactment

Article XII, Section 8 of the Nebraska Constitution (hereinafter "Initiative 300") originated as a constitutional amendment proposed through the initiative petition process and appeared as a ballot question on the 1982 general election ballot. (Complaint of Jim Jones, Terrence M. Shumacher, Shad Dahlgren, Todd Ehler and Robert E. Beck III, ¶ 14; App. 67, ¶ 14). A ballot title and explanatory statement was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. (App. 67-68, ¶¶ 15, 18).

As defined by law, the purpose of the ballot title was to express the purpose of the measure in up to one hundred words. (App. 67, ¶ 16). The ballot title submitted to

Nebraska voters with regard to Initiative 300, in part, stated as follows: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" (App. 67-68, ¶ 17).

The purpose of the explanatory statement is to explain the effect of a vote for and against a measure. (App. 68, ¶ 19). The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." (App. 68, ¶ 20).

The Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. (App. 68, ¶ 21). Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed. (App. 68, ¶ 22). Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution upon the issuance of a proclamation by the Governor on November 29, 1982. (App. 69, ¶ 25).

The Parties

Respondents, who are private individuals owning various interests in Nebraska farm and ranch land and livestock operations, brought suit alleging that Initiative

300 violates the Commerce Clause, 42 U.S.C. § 1983, and the ADA. (App. 73-80, ¶¶ 40-86). Respondents named as defendants Nebraska's Secretary of State and Attorney General in their official capacities. (App. 64). Respondents sought a declaration that Initiative 300 was unconstitutional and an injunction prohibiting its enforcement. (App. 81).

Respondent Terrence M. Schumacher ("Schumacher") is a resident of Boulder, Colorado who has an ownership interest in Nebraska farmland and would like to form a limited partnership and transfer the land to this entity. (App. 65, 71, ¶¶ 5, 32). Schumacher alleges that neither he nor any other members of his family reside on the Nebraska farmland and Schumacher, *himself*, is not engaged in the day to day labor and management of the farmland. (App. 71, ¶¶ 32-33).

Respondent Robert E. Beck III ("Beck") resides near Kearney, Nebraska and owns a commercial cattle feeding operation. (App. 66, 72-73, ¶¶ 9, 37). Beck alleges that Initiative 300 prohibits him from "conducting business with potential customers in other states who own cattle under a corporate entity or other 'syndicate'". (App. 72-73, ¶ 37).

Petitioner John Gale is the Secretary of State of the State of Nebraska and is charged with the duty, in his official capacity, to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations." Neb. Const. Art. XII, Sec. 8. (App. 63). Petitioner Jon Bruning is the Attorney General of the State of Nebraska and has the responsibility, in his official capacity, to "commence an action in

District Court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of [Art. XII, Sec. 8]" if the Attorney General has reason to believe that a corporation or syndicate is violating Initiative 300. Neb. Const. Art. XII, Sec. 8. (App. 63).

The Litigation Below

On December 15, 2005, the United States District Court for the District of Nebraska (hereinafter "District Court") partially granted Respondents' Motion for Summary Judgment as to Respondents' claims that Initiative 300 violated the Commerce Clause, 42 U.S.C. § 1983 and the ADA. (App. 57-58). Petitioners filed their Petition for Permission to Appeal the District Court's order pursuant to 28 U.S.C.A. § 1292(b) on December 23, 2005 and the Eighth Circuit Court of Appeals (hereinafter "Eighth Circuit" or "Circuit Court") granted Petitioners' Petition for Permission to Appeal on January 24, 2006.

On December 13, 2006, a panel of the Eighth Circuit affirmed the District Court ruling that Respondents had standing to bring their Commerce Clause claims, Initiative 300 violates the dormant commerce clause, and the portion of Initiative 300 found to be unconstitutional could not be severed from the remainder of the constitutional amendment. *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). (App. 1-18). The Eighth Circuit did not reach a conclusion as to whether Initiative 300 violates the Americans with Disabilities Act. *Jones*, 470 F.3d at 1271. (App. 18).

◆

REASONS FOR GRANTING THE PETITION

QUESTION #1

Whether granting standing to litigate a Dormant Commerce Clause claim to a party not impacted by the provisions of a state enactment inappropriately diminishes or eliminates the standing requirements articulated by decisions of this Court?

Before reaching the merits of a case, it is incumbent upon a court to determine whether the Respondents have "suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). In this instance, the Circuit Court determined that Respondents Schumacher and Beck had standing to bring their Commerce Clause claims even though the prohibitions of Initiative 300 did not apply to them. *Jones* 470 F.3d at 1267. (App. 9). In so holding, the Circuit Court has, for all intents and purposes, eliminated the standing requirement for a Dormant Commerce Clause claim. That holding is contrary to the standard articulated by this Court for determining whether a party has standing to bring a Commerce Clause claim.

A. Respondents Have Not Suffered an Injury in Fact Which Would Give Them Standing Under Article III of the United States Constitution.

Respondents, as private individuals, are not specifically limited by the prohibitions of Initiative 300 and therefore have not suffered an injury in fact which would entitle them to bring suit in the present instance. This Court has held that,

> [d]etermining that a matter before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects "the proper-and properly limited-role of the courts in a democratic society," *Allen v. Wright,* 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (quoting *Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.

DaimlerChrysler Corp. v. Cuno, ___ U.S. ___, 126 S. Ct. 1854, 1860-1861, 164 L. Ed. 2d 589 (2006).

This Court has gone on to recognize that the limitations of Article III standing are essential

> in maintaining the 'tripartite allocation of power' set forth in the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (quoting *Flast v. Cohen,* 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)). If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments

> would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed.1984).

DaimlerChrysler Corp., 126 S. Ct. at 1861.

In the present case, the Circuit Court found that Respondents Schumacher and Beck had standing to bring their claims. *Jones*, 470 F.3d at 1267. (App. 9). However, the Circuit Court's finding that Respondents suffered an injury in fact ignores the requirement set forth by this Court that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp.*, 126 S. Ct. at 1861 (quoting *Allen,* 468 U.S. at 751, 104 S. Ct. at 3315). To allow Respondents to bring their claims in this case, would be to diminish the requirements for standing under the Commerce Clause so significantly as to allow anyone claiming an intent or a desire to engage in a particular conduct to have Article III Standing.

Initiative 300 does not apply to individuals, but only to corporations and other limited liability entities. Respondents are free to own farmland and engage in farming and ranching as individuals and are not limited by Initiative 300. As Respondents are not personally limited by the prohibitions of Initiative 300, Respondents have not suffered a sufficient injury in fact which would allow them to have standing to bring their claims. In addition, Respondents do not engage in substantial business with corporations actually limited by Initiative 300 and therefore cannot bring their claims on behalf of the non-exempt corporations with which they seek to contract.

Petitioners acknowledge this Court's ruling that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat-for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.,* No. 05-608, 2007 WL 43797, at *5 (U.S. Jan. 9, 2007) (emphasis in original). However, Petitioners are not requiring that Respondents violate Initiative 300 in order to have standing to bring their claims. Petitioners only argue that Respondents' injuries are too indirect to enable them to have standing to bring their claims.

As an example, Respondent Schumacher will only be limited by the prohibitions of Initiative 300 *if* he forms a limited liability entity, and *if* that limited liability entity owns farm or ranch land in the state or engages in farming or ranching and *if* none of his family members, including his father and brother who reside only a few miles away from the farms currently owned by Respondent Schumacher, reside on or provide the day-to-day labor and management of the limited liability entity. (App. 109-10, ¶¶ 50-51). Respondent Schumacher does not have standing to bring his claims because his injuries are simply too indirect and speculative to arise as a sufficient injury in fact. At the very least, the standing requirements should require that the entity which is actually regulated by a statute, in this case a limited liability entity, be required to bring the lawsuit.

In holding that Respondents had standing to bring a Commerce Clause claim on behalf of corporations, with which Respondents did not even engage in substantial business, the Circuit Court has diminished the injury in fact requirement of Article III standing to such an extent as to make the requirement nonexistent for Commerce Clause claims. As the Circuit Court erred in finding that

Respondents had suffered a sufficient injury-in-fact which would give them standing to bring their claims, this Court should grant this Petition for Writ of Certiorari.

B. Respondents' Commerce Clause Claims Are Precluded by the Prudential Limitations to Standing.

Even if this Court finds that Respondents have suffered a sufficient injury-in-fact, the prudential limitations to standing prevent Respondents from bringing their claims on behalf of the corporations directly regulated by Initiative 300.

The third-party standing rule generally requires that a party "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564, 567, 160 L. Ed. 2d 519 (2004) (quoting *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205).

The purpose of the third-party standing rule arises out of a concern,

> that if the claim is brought by someone other than one at whom the constitutional protection is aimed, . . . the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. . . .
>
> *Id.* (internal citations omitted).

Respondents are barred from bringing their Commerce Clause claims under the third-party standing rule because they are not directly prohibited by Initiative 300 from engaging in any activity. Only the corporations with which Respondents desire to contract are regulated by Initiative 300. Moreover, Respondents' damages arise out of their inability to engage in business with corporations limited by the provisions of Initiative 300. Such damages are merely "an economic consequence" of the state's prohibition against corporations engaging in farming or ranching, or owning farm or ranch land in the state, and any relief due to Respondents turns on the rights of corporations actually regulated by Initiative 300. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381 (8th Cir. 1997).

Clearly, Respondents' Dormant Commerce Clause claims fall squarely under the third-party standing rule, thereby prohibiting Respondents from bringing their claims on behalf of the corporations with which they wish to do business. As the Circuit Court's holding that Respondents had standing to bring their Commerce Clause claims is in conflict with this Court's third-party standing rule, Petitioners' Petition for Writ of Certiorari should be granted.

QUESTION #2

Is the Dormant Commerce Clause violated by Article XII, Section 8 of the Nebraska Constitution which applies equally to all corporations conducting business in Nebraska and has only incidental effects on interstate commerce?

When the States were creating the federal government, there was a great fear that a powerful federal government would threaten the ability of the States to govern themselves and would threaten the freedom of individual citizens. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991).

"This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *U.S. v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 1626, 131 L. Ed. 2d 626 (1995) (*quoting Gregory*, 501 U.S. at 458, 111 S. Ct. at 2395). This division of authority protects the States from a powerful federal government threatening their ability to govern themselves and safeguarding the individual liberties of their citizens. One of the Constitutionally enumerated powers delegated to Congress was the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. This delegation was necessary to provide a framework for trade among the several states, not to regulate intrastate activities or to prevent the States from adopting any law which only has an incidental effect on interstate commerce.

This case involves the States' power to regulate and limit the powers and abilities of all state-created limited liability entities, including corporations, seeking to conduct business within a state. As Initiative 300 applies equally to all limited liability entities seeking to conduct business in Nebraska, and the Family Farm Exception is based upon whether or not the entity in question is a family-owned and operated entity, the Circuit Court erred in determining that the States were prohibited from regulating such entities under the auspices of the Dormant Commerce Clause.

To uphold the findings of the Circuit Court would severely limit the ability of the States to regulate those entities seeking to conduct business within a state's borders on grounds which do not discriminate against interstate commerce. As this Petition raises an important question concerning the balance of state and federal power under the Constitution of the United States, the Court should grant this Petition for Writ of Certiorari.

A. The States Should Be Free To Regulate Corporate Entities Whose Very Existence and Attributes Are a Product of State Law Provided Such Regulations Have Only Incidental Effects on Interstate Commerce.

As corporations are entities whose very existence and attributes are a product of state law, the States should be free to regulate such entities, provided such regulations only have incidental effects on interstate commerce. The Circuit Court held that Initiative 300 violates the Dormant Commerce Clause because the Family Farm Exception allows those corporations, in which the majority shareholder resides on or is actively engaged in the day-to-day labor and management of the corporation, to engage in farming in Nebraska. *Jones*, 470 F.3d at 1267-68. (App. 10). The Circuit Court concluded that the Family Farm Exception, therefore, discriminated against out-of-state corporations. *Id.*

However, the Circuit Court "failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of [corporations] is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89, 107 S. Ct. 1637, 1649, 95 L. Ed. 2d 67 (1987). The purpose behind Initiative 300 was to "prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land and to prohibit further establishment of non-family corporate crop and livestock operations." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). "By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce." *CTS Corp.*, 481 U.S. at 90, 107 S. Ct. at 1650. Such regulation of corporations is appropriate as it "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *CTS Corp.,* 481 U.S. at 91, 107 S. Ct. at 1650.

As Initiative 300 applies equally to all corporations and only has incidental effects on interstate commerce, the Circuit Court, in finding Initiative 300 invalid under the Dormant Commerce Clause, has severely hindered the ability of States to regulate the powers and abilities of corporations, which are purely creatures of state law.

B. The Circuit Court Refused to Adopt a Plausible Interpretation of an Enactment Which Does Not Facially Discriminate Against Interstate Commerce.

The Circuit Court further erred in refusing to adopt a plausible interpretation of Initiative 300 which did not violate the Dormant Commerce Clause. As the Circuit Court ruling is in direct conflict with the basic canon of constitutional construction, that a court should adopt a possible interpretation of a statute which does not raise constitutional problems, the Court should grant this Petition for Writ of Certiorari.

One of the canons of constitutional construction recognized by this Court is "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300, 121 S. Ct. 2271, 2279, 150 L. Ed. 2d 347 (2001) (quoting *Crowell v. Benson,* 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932)). As the Circuit Court refused to adopt a valid interpretation of Initiative 300 which did not violate the Dormant Commerce Clause, the Circuit Court's holding is in direct conflict with well-settled law of this Court.

The Circuit Court held that the Family Farm Exception to Initiative 300 found in Article XII, Section 8(1)(A) of the Nebraska Constitution (hereinafter "Family Farm Exception") facially discriminates against interstate commerce because it requires that the majority shareholder, or a family member, either reside on or provide the day to day labor and management of the operation. *Jones*, 470 F.3d at 1268. (App. 10). The Circuit Court found that such a requirement "favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them." *Id.* (quoting *Jones v. Gale*, 405 F.Supp.2d at 1081). (App. 10).

However, the Family Farm Exception does *not* require the majority shareholder or a family member to reside on or engage in farming on land *in Nebraska*. Instead, the Family Farm Exception provides an exception based on the determination of whether the corporation qualifies as a family farm corporation, *regardless of where that farm is located.*

Pursuant to the plain language of Initiative 300, a Colorado corporation could qualify for the Family Farm Exception and own farmland in Nebraska, provided the majority shareholder or one of his family members resides on or is actively engaged in the day-to-day labor and management of a *Colorado* farm. Such an interpretation of Initiative 300 does not discriminate against interstate commerce.

The Circuit Court, however, held that the phrase "'of the farm or ranch' can only refer to a farm or ranch in Nebraska" and therefore concluded that the Family Farm Exception favors Nebraska corporations. *Jones*, 470 F.3d at 1268. (App. 11-12). As the Circuit Court chose to ignore an interpretation of Initiative 300 which did not facially violate the Dormant Commerce Clause, the Circuit Court's holding is in direct conflict with this Court's basic canon of constitutional construction.

In addition, the Circuit Court's interpretation of the Family Farm Exception leads to the nonsensical result that each corporation farming land that is not contiguous is actually operating numerous individual farms instead of one, single farming operation. Under the Circuit Court's analysis, the majority shareholder, or a family member, would be required to reside on *each tract of land* owned by the corporation in order to qualify for the Family Farm Exception.

The more logical interpretation of the Family Farm Exception would require that the majority shareholder or family member must reside on *any* tract or parcel of farm or ranch land owned by the corporation. Following this line of reasoning, a corporation could also qualify for the Family Farm Exception if the majority shareholder or a family member provides the day to day labor and management on any tract of land, inside or outside of Nebraska, which is owned by the corporation. Such an interpretation is fairly derived from the plain language of the Family Farm Exception and does not unduly burden interstate commerce as it does not discriminate against a corporation based on its status of being an out-of-state corporation, but instead on its status of being a non-family farm corporation.

As Initiative 300 can be interpreted in a way that does not facially discriminate against interstate commerce, the Circuit Court erred in finding that Initiative 300 on its face violated the Commerce Clause. "If a law is susceptible of a reasonable interpretation which supports its constitutionality, the court must accord the law that meaning. *Planned Parenthood of Minnesota v. State of Minn.*, 910 F.2d 479, 482 (8th Cir. 1990); *United States v. National Dairy Prod. Corp.,* 372 U.S. 29, 32, 83 S. Ct. 594, 597, 9 L. Ed. 2d 561 (1963). Since Initiative 300 can be interpreted in a way that does not facially violate the Commerce Clause, the Supreme Court should grant this Petition for Writ of Certiorari.

C. The Decision of the Circuit Court Conflicts with the Previous Determination of the Intent of Initiative 300.

The Circuit Court's conclusion that Initiative 300 was adopted with a discriminatory intent against interstate commerce also conflicts with a previous holding of the Circuit Court. The Circuit Court relied upon its previous holding in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003), the language of Initiative 300, and the ballot title to conclude that "[t]he manifest purpose of Initiative 300 . . . was to differentiate, or discriminate between family farm corporations located in Nebraska as opposed to those located elsewhere." *Jones*, 470 F.3d at 1269. (App. 14).

However, the Circuit Court's conclusion is in direct conflict with its previous holding that the intent of Initiative 300 was to "retain and promote family farm operations in Nebraska and . . . to prevent a perceived threat that would stem from unrestricted corporate ownership of Nebraska farm land by preventing the concentration of farmland in the hands of non-family corporations." *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 333 (8th Cir. 1991). It is clear from the Circuit Court's previous holding that the purpose of Initiative 300 was to retain and promote family farms and to prevent non-family farm corporations from owning farmland in Nebraska; a purpose which does not discriminate against interstate commerce. The Circuit Court did not overturn its previous holding and, in fact, made no attempt to distinguish its findings in the present case from its previous holding in *MSM Farms, Inc.* As the Circuit Court's previous determination of the purpose of Initiative 300 does not discriminate against interstate commerce, the Court should grant this Petition for Writ of Certiorari.

QUESTION PRESENTED #3

> **When the highest court of a state has recognized the concept of severability in state enactments, is it appropriate for a federal court to overturn an entire state enactment when only a severable portion of that enactment has been found to violate our federal constitution?**

The Circuit Court's decision not to sever what it found to be the unconstitutional portions of Initiative 300 is in conflict with controlling law of the highest court of the State of Nebraska. *Jones*, 470 F.3d at 1271. (App. 17). When a state law is challenged on the basis of federal law, "state law is displaced only 'to the extent that it actually conflicts with federal law.'" *Dalton v. Little Rock Family Planning Serv.*, 516 U.S. 474, 476, 116 S. Ct. 1063, 1064, 134 L. Ed. 2d 115 (1996) (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U.S. 190, 204, 103 S. Ct. 1713, 1722, 75 L. Ed. 2d 752 (1983)).

The Circuit Court in the present case upheld the ruling of the District Court that Initiative 300 discriminates against interstate commerce in violation of the Commerce Clause. *Jones*, 470 F.3d at 1271. (App. 17). The District Court found that the specific language which caused Initiative 300 to be unconstitutional was that language which helps define the Family Farm Exception, "*at least one of whom is a person residing on or actively engaged in the day to day labor and management of the* *farm or ranch. . . .* " *Jones v. Gale*, 405 F.Supp.2d at 1087. (App. 55).

Nebraska case law is controlling as to the issue of whether a provision may be severable. The Nebraska Supreme Court has held, in determining the severability of a voter initiative, a court must first examine "whether, absent the invalid portion, a workable and independently enforceable plan remains." *Duggan v. Beermann*, 249 Neb. 411, 429, 544 N.W.2d 68, 79 (1996). An entire act fails only when the "invalid portions [of a statute] are so interwoven with the rest of the act that the act may not be operative with the void portions eliminated . . . " *Duggan*, 249 Neb. at 428, 544 N.W.2d at 79; (quoting *State ex rel. Douglas v. Herrington,* 206 Neb. 516, 524, 294 N.W.2d 330, 334 (1980)).

In the present case, the District Court previously acknowledged "Initiative 300 could well provide a workable plan, independently enforceable, if the 26 words at issue were stricken. Corporations and syndicates would be prohibited from engaging in farming or ranching in Nebraska, with exceptions made for family-farm corporations and limited partnerships." *Jones v. Gale*, 405 F.Supp.2d at 1087-88. (App. 56). Therefore, because a workable plan remains even if the offending language in the Family Farm Exception was severed, the Circuit Court should have severed the offending language of the Family Farm Exception and upheld the remainder of Initiative 300.

The second factor of the severability analysis is "whether the unconstitutional portion was such an inducement that the constitutional portions would not have passed without it." *Duggan*, 244 Neb. at 430, 544 N.W.2d at 79. The Circuit Court found that the residency and day to day labor and management requirements were such an inducement and that Initiative 300 would not have been adopted without the provision. *Jones*, 470 F.3d at 1271 (quoting *Jones v. Gale*, 405 F.Supp.2d at 1088). (App. 17)

However, although the Family Farm Exception itself is an inseparable part of Initiative 300, the requirement that the majority shareholder reside on or be actively engaged in the day to day labor and management of the operation is not inextricably entwined with the remainder of the statute. Certainly, from a reading of the explanatory statement and the ballot title, it is clear that the voters sought to adopt a constitutional amendment which prohibited corporations from owning farm or ranch land or engaging in farming or ranching, with an exception for family farm or ranch corporations. (App. 67-68, ¶¶ 17, 20). But nowhere within the explanatory statement or the ballot title will one find the requirement that in order to qualify for the Family Farm Exception, the majority shareholder must reside on or be actively engaged in the day to day labor and management of the corporation. (App. 67-68, ¶¶ 17, 20). Although the language in question certainly provides some clarification as to what constitutes a family farm corporation, it by no means can be construed as the motivating factor driving the adoption of Initiative 300 as such language was not even important enough to be included as part of the ballot language or explanatory statement and therefore, the second prong of the severability test is satisfied.

The final factor to be considered, but which is not determinative, is whether Initiative 300 has a severability clause. *Duggan*, 249 Neb. at 432, 544 N.W.2d at 80-81. In the present case, there is no severability clause, which the Circuit Court found warranted the conclusion that the residency and day to day labor and management requirement could not be severed from the remainder of Initiative 300. *Jones*, 470 F.3d at 1271. (App. 17). However, because the residency and day to day labor and management requirement is otherwise severable, the Circuit Court should have followed the Supreme Court's admonition that "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Dalton*, 516 U.S. at 476, 116 S. Ct. at 1064.

In ruling that the offending language was not severable from the remainder of Initiative 300, the Circuit Court ignored the well-settled law of the United States Supreme Court to only invalidate a statute to the extent necessary. *Dalton*, 516 U.S. at 476, 116 S. Ct. at 1064. In addition, the Circuit Court's holding is in direct conflict with the controlling case law of the Nebraska Supreme Court, the application of which would justify the severance of the unconstitutional language of Initiative 300 and a ruling that the remainder of Initiative 300 should continue in full force and effect. *Duggan*, 249 Neb. at 428-32, 544 N.W.2d at 79-81.

QUESTION PRESENTED #4

When facts are in dispute and a circuit court must weigh evidence presented by the parties, is summary judgment appropriate under the standards articulated by this court?

Finally, the Circuit Court misapplied this Court's summary judgment standard in ruling that this case could be decided on summary judgment. Petitioners are entitled to their day in Court and should not be denied that right on the basis of the Circuit Court's misapplication of the summary judgment standard. Therefore, in order to preserve Petitioners' Seventh Amendment Rights to a fair trial, the Court should grant this Petition for Writ of Certiorari.

A Summary Judgment Was Inappropriate as the Facts Relied Upon in Determining Standing Are in Dispute.

The facts upon which the Circuit Court relied in determining that Respondent Schumacher had standing to bring his claims are in dispute and therefore summary judgment was inappropriate. *Jones*, 470 F.3d at 1266. (App. 6). For purposes of summary judgment, a court should not weigh the evidence presented, but should view the evidence in a light most favorable for the non-moving party in determining whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962).

The Circuit Court found that "[n]either [Schumacher] nor any of his relatives reside on his farmland and he does not live close enough to the land to perform the day-to-day labor and manage it." *Jones*, 470 F.3d at 1266. (App. 6). The Circuit Court concluded, therefore, that Schumacher was unable to meet the Family Farm Exception. *Id.*

However, evidence was presented to the Circuit Court that Schumacher could have qualified for the Family Farm Exception because Schumacher's "brother Tim Schumacher and his father Matt Schumacher live in Platte Center, at the center of Platte County, where some of the Schumacher family land is located. . . . The Schumacher farm is located within a few miles of the residence of Matt and Tim Schumacher." (App. 109-110, ¶¶ 49-51). As members of Schumacher's family could have provided the day to day labor and management of Schumacher's farm, Schumacher could have qualified for the Family Farm Exception and therefore did not have standing to bring his claims. The Circuit Court, in presuming that Schumacher could not qualify for the Family Farm Exception, relied upon facts which were in dispute and therefore, summary judgment was inappropriate.

The Circuit Court's recent trend of affirming summary judgments where there is a dispute of material fact has severely eroded the Seventh Amendment right of parties to a trial. *See Melvin v. Car-Freshener Corp.*, 453 F.3d 1000 (8th Cir. 2006); *Fender v. Bull*, 166 Fed.Appx. 869 (8th Cir. 2006); *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606 (8th Cir. 2006); *James ex rel. James v. Friend*, 458 F.3d 726 (8th Cir. 2006); *Green v. Franklin Nat. Bank of Minneapolis*, 459 F.3d 903 (8th Cir. 2006).

Senior Judge Donald Lay, has identified the Circuit Court's misuse of summary judgment in declaring in a dissenting opinion that,

> [t]oo many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. . . . Summary judgment should be the exception, not the rule. It is appropriate *"only . . . where it is quite clear what the truth is, . . . for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464, 467, 82

> S. Ct. 486, 7 L. Ed. 2d 458 (1962) (emphasis added) (citation and internal quotations omitted).
>
> It is undeniable that summary judgment is a valuable tool, the use of which allows overextended courts to remove cases that lack merit from their dockets. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). However, in accomplishing this goal, we have an obligation not to "overlook[] considerations which make . . . summary judgment an inappropriate means to that very desirable end." *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944).

Melvin v. Car-Freshener Corp. 453 F.3d at 1004 (dissent).

In the present case, the Circuit Court, in concluding Respondents had standing, relied upon facts which were in dispute and viewed those facts in favor of Respondents, the moving party. *Jones*, 470 F.3d at 1266. (App. 6). As the Circuit Court improperly applied this Court's standard for summary judgment, the Court should grant this Petition for Writ of Certiorari.

B. The Circuit Court Improperly Imposed the Burden on the Nonmoving Party, on a Motion for Summary Judgment, to Establish the State Had No Other Means to Advance a Legitimate Local Interest.

The Circuit Court also improperly imposed the burden on the nonmoving party to establish, on a motion for summary judgment, that it had no other means to advance a legitimate local interest. *Jones*, 470 F.3d at 1270. (App. 15-16). As the Circuit Court's holding is in conflict with this Court's summary judgment standard, the Court should grant this Petition for Writ of Certiorari.

Petitioners presented a substantial amount of evidence regarding the legitimate local interests which the state had no other means, but through Initiative 300, to advance. (App. 90-91, 96-97, 106-07). The legitimate local interests included,

> (a) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor; . . . (d) Erosion of agricultural markets free of production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers; (e) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations requiring fewer laborers to operate; (f) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point of origin by non-family farm and ranch corporations; and (g) Ability of non-family farm and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

(App. 90-91, 96-97).

The Circuit Court ignored the evidence presented by Petitioners and instead found that Petitioners "do not indicate why land use and environmental regulations could not resolve any difficulties associated with absentee ownership." *Jones*, 470 F.3d at 1270. (App. 15-16). The Circuit Court further found fault with the State's use of a "vague definition" of "negative effects on the social and economic culture of rural Nebraska" as a legitimate state interest the State sought to advance. *Jones*, 470 F.3d at 1270. (App. 16).

But Petitioners' use of such vague terms was absolutely necessary given that this case was decided on summary judgment. Had Petitioners been given the opportunity at trial to present evidence of legitimate local interests, which it could advance by no other means, perhaps the detail sought by the Circuit Court could have been more clearly articulated. It is precisely because this case was determined on summary judgment that the interests presented were vague. If more detail was sought, the Circuit Court should not have weighed the evidence presented, but should have found there was substantial dispute of material facts which warranted the reversal of the District Court's grant of summary judgment.

Petitioners acknowledge that the Circuit Court's ruling in this case is consistent with its previous ruling in *Hazeltine* that South Dakota's version of a corporate farming ban was adopted with a discriminatory purpose and reasonable, non-discriminatory means exist to advance the state's interest of protecting the family farm. 340 F.3d at 596-97. However, at least the Defendants in *Hazeltine* were given the opportunity, at a trial on the merits, to fully present its legitimate state interests and the lack of nondiscriminatory means to advance these state interests. 340 F.3d at 593-96.

The Circuit Court's analysis, in the present case, as to whether Petitioners had presented any evidence of a legitimate state interest sought to be advanced by Initiative 300 is yet another example of the Circuit Court's abuse of summary judgment. As explained by Eighth Circuit Senior Judge Lay, "[t]oo many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain." *Melvin*, 453 F.3d at 1003-04 (Judge Lay, dissent).

As the Circuit Court imposed the burden on Petitioners to establish a legitimate local interest to be advanced by Initiative 300 on summary judgment, and then discredited the evidence presented, the Circuit Court improperly applied the Supreme Court's standard for summary judgment. *Jones*, 470 F.3d at 1270. (App. 15-16). The Circuit Court's ruling allows judges to weigh evidence and make rulings on said evidence before trial thereby usurping the Seventh Amendment rights which should be afforded to all parties to a case. Therefore, this Petition for Writ of Certiorari should be granted.

◆

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 23rd day of January, 2007.

JOHN GALE, In his official capacity as Secretary of State of Nebraska; and, JON BRUNING, In his official capacity as Attorney General of Nebraska, Petitioners,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-1308

Jim Jones; Terrence M. * Appeal from the
Schumacher; Shad Dahlgren; * United States
Harold G. Rickertsen; Todd Ehler; * District Court for the
Robert E. Beck, III, * District of Nebraska.
*
Appellees, *
*
v. *
*
John Gale, in his official capacity *
as Secretary of State of Nebraska; *
Jon Bruning, in his official capacity *
as Attorney General of Nebraska, *
*
Appellants. *
*
Organization for Competitive *
Markets; R-Calf USA; Oregon *
Livestock Producers Association; *
Spokane County Cattle Producers; *
Icon; The Independent Beef Association *
of North Dakota; Montana *
Cattleman's Association; Nevada *
Livestock Association; State of *
Minnesota; State of Iowa; State of *
Missouri; State of North Dakota; *
State of West Virginia; Nebraska *
Farmers Union; The Center for *
Rural Affairs; The Nebraska *
Grange; Women Involved in Farm *
Economics; The Nebraska Catholic *
*

Conference; The American Corn *
Growers of Nebraska; Nebraska *
Appleseed Center for Law in the *
Public Interest; Sierra Club; The *
Great Plains Environmental Law *
Center; Nebraska Environmental *
Action Coalition; Michael Jacobson; *
Nebraska League of Rural *
Voters; Nebraskans for Peace; *
National Farmers Union; National *
Family Farm Coalition; American *
Corn Growers; Minnesota Farmers *
Union; Land Stewardship Project; *
North Dakota Farmers Union; *
Dakota Resource Council; South *
Dakota Farmers Union; Dakota *
Rural Action; Iowa Farmers Union; *
Iowa Citizens for Community *
Improvement; Missouri Farmers *
Union; Missouri Rural Crisis *
Center; AR Farmers Union; *
Campaign For Family Farms; *
Western Organization of Resource *
Councils; Federation of South *
Cooperatives; Illinois Farmers *
Union; Illinois Stewardship *
Alliance; IN Farmers Union; *
Citizens Action Coalition of *
Indiana; Powder River Basin *
Resource Council; KS Farmers *
Union; WI Farmers Union; OH *
Farmers Union; MI Farmers *
Union; Pennsylvania Farmers *
Union; Rocky Mountain Farmers *
Union; Montana Farmers Union; *
Utah Farmers Union; Texas *
Farmers Union; Alaska Farmers *
Union; Oregon Farmers Union; *

WA Farmers Union; California Farmers Union, *

Amici on behalf of Appellants. *

Nebraska Bankers Association; Nebraska Chamber of Commerce and Industry, Inc.; The Nebraska Realtors Association; South Dakota Farm Bureau, *

Amici on Behalf of Appellees. *

United States of America, *

Amicus on Behalf of Appellees. *

Submitted: September 28, 2006
Filed: December 13, 2006

Before ARNOLD, BYE, and MELLOY, Circuit Judges.

ARNOLD, Circuit Judge.

The plaintiffs, six people who own various interests in Nebraska farm and ranch land operations, filed this action against Nebraska's secretary of state and attorney general in their official capacities (State Officials). The plaintiffs claimed that Initiative 300, which voters adopted as part of the state constitution in 1982, *see* Neb. Const. art. XII, § 8, violates the commerce clause, privileges and immunities clause, and equal protection clause of the United States Constitution and the Americans with Disabilities Act (ADA). All parties moved for summary judgment. The district court[1] granted summary judgment to the plaintiffs on their commerce clause and ADA claims, and granted summary judgment to the State Officials on the remaining claims. The State Officials appeal, and we affirm the district court's judgment that the amendment based on Initiative 300 is unconstitutional because it violates the dormant commerce clause.

I.

Initiative 300 prohibits corporations or syndicates (non-family-owned limited partnerships) from acquiring an interest in "real estate used for farming or ranching in [Nebraska]" or "engag[ing] in farming or ranching," with certain exceptions. *See* Neb. Const. art. XII, § 8. The initiative originated as a constitutional amendment proposed through the initiative process and appeared as a ballot question on Nebraska's 1982 general election ballot. The Nebraska Attorney General prepared a ballot title and explanatory statement for Initiative 300. *See* Neb. Stat. § 32-1410(1). The title read: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" An explanatory statement defines the effect of a vote for and against a measure. *Id.* The explanatory statement presented to Nebraska voters for Initiative 300 read: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." The voters adopted Initiative 300, and it became part of the Nebraska constitution upon the issuance of a proclamation by the governor in 1982.

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[1] The Honorable Laurie Smith Camp, United States District Judge for the District of Nebraska.

The Initiative defines a "family farm or ranch corporation," which is specifically excepted from the initiative's restrictions, as "a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family . . . at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch." Neb. Const. art. XII, § 8. In addition, an exemption from the corporate farming ban is provided, *inter alia*, to former "family farm corporations" for a period of fifty years after they cease to meet the criteria for that designation, provided that majority ownership of the corporation remains within the family. *Id.*

II.

The State Officials contend that none of the plaintiffs had standing to bring the commerce clause claim and therefore the district court erred in concluding that it had jurisdiction. A plaintiff has the burden of establishing subject matter jurisdiction, *Hoekel v. Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir. 1994) (per curiam), *cert. denied*, 513 U.S. 974 (1994), for which standing is a prerequisite, *Faibisch v. University of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). To establish standing, a plaintiff is required to show that he or she had " 'suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' Second, the injury must be traceable to the defendant's challenged action. Third, it must be 'likely' rather than 'speculative' that a favorable decision will redress the injury." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)), *cert. denied*, 541 U.S. 1037 (2004).

We review the district court's conclusion that the plaintiffs had standing *de novo*. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484 (8th Cir. 2006). Although the district court concluded that all of the plaintiffs had standing to bring the commerce clause claim, we have said previously that "where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial" to jurisdiction. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992) (internal quotation marks omitted) (citing *Bowen v. Kendrick*, 487 U.S. 589, 620 n. 15 (1988)).

Plaintiff Terrence Schumacher, a resident of Boulder, Colorado, has an ownership interest in Nebraska farmland in five counties. Neither he nor any of his relatives reside on his farmland and he does not live close enough to the land to perform the day-to-day labor and manage it. Mr. Schumacher would like to transfer his farmland to a limited liability entity, which would, *inter alia*, allow for improved fiscal planning and operational management of the farmland as an operating unit and provide more favorable options for estate planning. Initiative 300 precludes Mr. Schumacher from creating a limited liability farm operation because he does not meet the conditions of the family farm exemption, and as a result he has suffered and continues to suffer economic loss based on reduced fiscal and operational management efficiencies, marketing opportunities, and borrowing power, as well as increased administration expenses and federal estate taxes. Because Mr. Schumacher cannot qualify for the family farm exemption, he is exposed to personal liability for the debts, obligations, contracts, and torts related to his Nebraska farmland.

The State Officials acknowledge that Mr. Schumacher may not purchase farmland on a limited liability basis unless he or a member of his family resides on the farmland or is engaged in the farm's day-to-day labor and management. But they argue that he nevertheless lacks standing because the family-farm requirements apply to everyone and thus do not unduly burden Mr. Schumacher's interests. We think, however, that the question of interstate commerce 'burdens' pertains to the merits of Mr. Schumacher's claim and is "analytically distinct from the 'injury-in-fact' determination that is central to standing." *Adams v. Watson*, 10 F.3d 915, 925 n. 16 (1st Cir. 1993).

Robert Beck III, another plaintiff, resides in rural Kearney, Nebraska, where he owns a cattle feedlot that provides for the daily care and feeding of cattle owned by his customers, many of whom live outside of Nebraska. Mr. Beck cannot contract with non-exempt out-of-state corporate entities for the purpose of raising and feeding livestock for slaughter. Mr. Beck alleges that as a result, he has lost business, income, and borrowing power. He further alleges that Initiative 300 has prevented him from gaining unfettered access to the national cattle market, and thereby reduced his competitiveness and ability to gain new customers resulting in economic loss. In addition, Mr. Beck's access to working capital from out-of-state corporations is restricted because Initiative 300 prohibits non-exempt entities that provide equity in the form of ownership of cattle from feeding cattle at Mr. Beck's feedlot. The initiative prohibits him from freely changing ownership of his commercial cattle feeding operations and limits his ability to pool assets and resources with other unrelated Nebraska farmers and out-of-state corporations to acquire more land and personal assets for future development of his cattle operation. Finally, Initiative 300 prevents Mr. Beck from establishing succession plans that would allow him to transfer ownership gradually to employees who provide the day-to-day labor while he continues to manage the operation.

The State Officials acknowledge that under *Hazeltine*, 340 F.3d at 392, a plaintiff who does substantial business with out-of-state corporations and would suffer imminent business losses as a result of the challenged law has standing to bring a commerce clause claim. They argue, however, that Mr. Beck lacks standing because he does not have "actual contracts with out-of-state corporations" and therefore did not suffer an injury in fact.

But we agree with the district court that the predicaments of Messrs. Schumacher and Beck are comparable to those of the plaintiffs in *Hazeltine*, who we concluded had standing to challenge an amendment to the South Dakota Constitution that prohibited corporations and syndicates from holding land in the state. *See Hazeltine*, 340 F.3d at 591-92. We also think that the plaintiffs have standing to challenge the constitutionality of a law that has a direct negative effect on their "'borrowing power, financial strength, and fiscal planning,'" *see Hazeltine*, 340 F.3d at 592 (quoting *Clinton v. City of New York*, 524 U.S. 417, 431 (1998)). We do not believe that Mr. Beck was required to show that he had contracted with an out-of-state corporation in order to have standing. Both Mr. Schumacher and Mr. Beck explained how Initiative 300 had negatively affected their ability to earn income, borrow, and plan for their financial future. Mr. Schumacher's asserted inability to dispose of his land as he wishes weakens his financial position in precisely the way that meets the conditions we set out in *Hazeltine* and that the Supreme Court established in *Lujan*: His claim involves a concrete and actual injury that can be traced back to the State Officials, and it is entirely likely that a favorable ruling will redress the injury. Because Messrs. Schumacher and Beck have standing, the district court had jurisdiction over the case.

III.

We turn now to the question of whether Initiative 300 violates the dormant commerce clause of the United States Constitution. Where the relevant facts are not in dispute, we review *de novo* the question of whether a state constitutional provision violates the commerce clause. *See R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002).

The dormant commerce clause prohibits states from enacting laws that "discriminate against or unduly burden interstate commerce." *Hazeltine*, 340 F.3d at 592-93. As we explained in *Hazeltine*, when determining whether a law violates the dormant commerce clause, we ask first "whether the challenged law discriminates against interstate commerce. Discrimination in this context refers to 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 593. (quoting *Oregon Waste Sys., Inc. v.*

Department of Envtl. Quality, 511 U.S. 93, 99 (1994)). A law "overtly discriminates" against interstate commerce if it is discriminatory on its face, if it has a discriminatory purpose, or if it has a discriminatory effect. *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000).

A.

We consider first whether Initiative 300 is discriminatory on its face. The State Officials argue that because Initiative 300 does not expressly prohibit the owning of agricultural land by out-of-state citizens and does not exclude solely out-of-state corporations, it cannot be interpreted to discriminate facially against interstate commerce. We do not think that an interstate-commerce claim is precluded by the absence of an express prohibition on non-resident ownership or the fact that some Nebraska corporations (those that are not "family farm corporations") may suffer a negative impact under Initiative 300, *see C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391-92 (1994). We conclude instead that Initiative 300 is facially discriminatory because its prohibition against farming by corporations and syndicates does not apply to family farm corporations or limited partnerships in which at least one family member resides on or engages in the daily labor and management of the farm. We agree with the district court's holding that "Initiative 300 on its face, therefore, favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them." *Jones*, 405 F.Supp.2d at 1081.

The State Officials maintain that this is an incorrect interpretation of Initiative 300. They argue that the law does not require the majority shareholder to live or work on farmland in Nebraska to qualify for the exception; they assert that a Colorado family farm corporation, for example, could operate on land in Nebraska as long as its majority shareholder or one of his or her family members lived or worked at the location of the corporation's Colorado farm. This argument is meritless. Although, as the officials observe, "[i]f a law is susceptible of a reasonable interpretation which supports its constitutionality, the court must accord the law that meaning," *Planned Parenthood of Minnesota v. State of Minnesota*, 910 F.2d 479, 482 (8th Cir. 1990), we do not believe that the interpretation offered by the State Officials is reasonable. Instead, their proposed interpretation of the family farm exemption, which attempts to avoid the interstate commerce problem, is untenable because it conflicts with the plain language of Initiative 300, contradicts the ballot language presented to voters, and is inconsistent with the Nebraska Supreme Court's reading of the law.

We give the words of Initiative 300 their most natural and obvious meaning. *See Pig Pro Nonstock Coop. v. Moore*, 253 Neb. 72, 83, 568 N.W.2d 217, 224 (1997); *see also Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999). As plaintiffs point out, the initiative regulates the ownership of land "in *this* state" and requires residing on or engaging in the daily labor and management "of *the* farm or ranch." Neb. Const. art. XII, § 8 (emphases added). The focus of the text is thus on activities within the state of Nebraska, and the phrase "of the farm or ranch" can only refer to a farm or ranch in Nebraska. Despite the State

Officials' heroic effort to develop a plausible alternative construction, we think it rather plain that Initiative 300 requires residing or working on a Nebraska farm.

Our reading acquires further support from the ballot language that accompanied the text when Initiative 300 was voted on. As we have already said, the ballot stated that the amendment's purpose was to prohibit further purchases of agricultural land "by any corporation . . . other than . . . a *Nebraska* family farm corporation." *Jones*, 405 F.Supp.2d at 1073 (emphasis added). The words "a Nebraska family farm corporation" cannot reasonably be read to mean that family farm corporations in other states could qualify.

The Nebraska Supreme Court's interpretation of Initiative 300 also undermines the State Officials' proposed construction. The court stated that "the plain language of Article XII § 8" prohibits "absentee ownership and operation of farm and ranch land by a corporate entity." *Pig Pro.*, 253 Neb. at 91, 568 N.W.2d at 228. If the initiative meant to prohibit absentee ownership, it would manifestly defeat its purpose to interpret it to mean that a corporation located in some other state would be allowed to operate farmland in Nebraska.

The State Officials quote *Dempsey* for the proposition that when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *See Dempsey*, 167 F.3d at 461 (internal quotations and citations omitted). But the officials are engaging in selective quotation. In *Dempsey*, we specifically held that we always begin statutory interpretation with the "plain language of the statute itself" and that we will construe a statute to avoid constitutional problems only if its "language is ambiguous" and such a construction does not plainly contradict the "legislative intent." *Id.* As we have said, the language of Initiative 300 plainly requires residing or working on a Nebraska farm; thus there is no ambiguity to construe. We note, moreover, that even if there were an ambiguity, we would reject the State Officials' proposed interpretation because it would frustrate the voters' intent, which we address more fully below.

Thus, we read Initiative 300 as the district court did and hold that Initiative 300 is discriminatory on its face because it affords "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Hazeltine*, 340 F.3d at 593 (internal citations omitted).

B.

Although we have already determined based on a facial review that Initiative 300 is discriminatory, we agree with the district court that there is another, independent reason for concluding that it burdens out-of-state interests: The initiative has a discriminatory intent. *Cf. Hazeltine*, 340 F.3d at 593. As the State Officials point out, the Nebraska Supreme Court has held that the intent of the voters in adopting an initiative amendment to the state constitution must be determined from the words of the amendment itself. *See Pig Pro*, 253 Neb. at 82, 568 N.W.2d at 223-24. But the State Officials admit that we are not bound by the Nebraska Supreme Court's precedent on this point. Rather, as we have held previously, we "look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose," which may include evidence in the form of "statements by lawmakers." *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004). In determining the purpose of an initiative amendment in *Hazeltine*, 340 F.3d at 593-96, we relied on the statements and conduct of the amendment's drafters. And in *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995), we considered a pamphlet prepared for voters by the state attorney general in determining whether a referendum had a discriminatory intent.

The text of Initiative 300 and the ballot title reveal its discriminatory purpose. Under Nebraska law, a "ballot title shall express the purpose of the measure" submitted to the voters, Neb. Stat. § 32-1410(1), and here the ballot title told voters that Initiative 300 would "prohibit[] ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation." We agree with the district court that the "ballot title, and the language of Initiative 300 defining limited-liability-entity exemptions for family farms and ranches, clearly indicate that people living and working in Nebraska, and their families, will be given . . . favored treatment." *Jones*, 405 F.Supp.2d at 1080. The manifest purpose of Initiative 300 therefore was to differentiate, or discriminate, between family farm corporations located in Nebraska as opposed to those located elsewhere.

Further, while we deem it unnecessary to discuss in detail the history preceding the adoption of Initiative 300, we believe that that history bolsters the plaintiffs' contention that discriminatory intent motivated voters to adopt Initiative 300. To name but one example, television advertisements that supporters of Initiative 300 produced before its adoption concluded by stating: "Let's send a message to those rich out-of-state corporations. Our land's not for sale, and neither is our vote. Vote for Initiative 300." It is clear beyond cavil that these ads bristle with an animus against out-of-state corporations.

C.

We have concluded that Initiative 300 discriminates against out-of-state entities both on its face and because of its discriminatory intent. And if a state constitutional provision "is indeed discriminatory, it is '*per se* invalid' unless the [State] 'can demonstrate, under rigorous scrutiny, that [it has] no other means to advance a legitimate local interest.'" *Hazeltine*, 340 F.3d at 593 (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

The State Officials argue that some of the threats that stem from unrestricted corporate ownership of Nebraska farm and ranch land include absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's land, water, and natural resources. While the State Officials concede the district court's finding that the third problem could be resolved through other means, as, for instance, by regulation, they assert that the first two issues require the intervention of Initiative 300.

As the plaintiffs point out, however, the State Officials' argument with respect to preventing absentee ownership of land is directly contradicted by their interpretation of the family farm exception, under which an out-of-state corporation could own farmland or engage in farming operations without residing or performing daily labor in Nebraska. In addition, the State Officials do not indicate why land use and environmental regulations could not resolve any difficulties associated with absentee ownership. We think that the same holds true for the State Officials' claim about the "negative effects on the social and economic culture of rural Nebraska," though we cannot be sure what is meant by these terms. It appears in fact that the State Officials are attempting to obfuscate the issue by using such a vague definition of these "negative effects" that the definition itself is what prevents us from suggesting concrete alternative measures. Were the state interests more clearly defined, we would be able to discern whether specific regulations could address the particular difficulties that frustrate the promotion of those interests. We assume that a mere desire to maintain the status quo cannot in itself be a "legitimate local interest." Indeed, it is that kind of xenophobia that the dormant commerce clause sets its face against.

The State Officials failed to meet their burden of showing that Nebraska could not advance a legitimate local interest without discriminating against non-resident farm corporations and limited partnerships. The amendment passed as a result of Initiative 300 thus fails the conditions that we set out in *Hazeltine*, and we affirm the district court's holding that Neb. Const. art. XII, § 8 violates the dormant commerce clause both on its face and based on its discriminatory intent.

IV.

The State Officials urge us not to hold the entire amendment unconstitutional even if part of it is unconstitutional in its current form; rather, they say, we should sever its unconstitutional portions. As the district court explained, the Nebraska Supreme Court has held that a portion of a statute is severable if a "workable plan" remains after severance, the valid portions are "independently enforceable," the invalid portion did not serve as "such an inducement to the valid parts that the valid parts would not have passed without the invalid part," and severance will not violate the "intent of the Legislature." *Jaksha v. State*, 241 Neb. 106, 129, 486 N.W.2d 858, 873 (1992), *as quoted in Jones*, 405 F.Supp.2d at 1087. We note, as did the district court, that the Nebraska Supreme Court has held that the constitutional part of an initiative to amend the state constitution "may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining [part]." *Duggan v. Beerman*, 249 Neb. 411, 430, 544 N.W.2d 68, 79-80 (1996).

While severing the unconstitutional portion of the initiative amendment here leaves a workable plan that is independently enforceable, a severance would not satisfy the conditions that the Nebraska Supreme Court has outlined for a severance. Initiative 300 contains no severability clause and, like the district court, we "cannot conclude that the residency or day-to-day labor-and-management provisions in the family-farm exemption were not an inducement to the passage of Initiative 300," *Jones*, 405 F.Supp.2d at 1088. Reading the amendment as we do, it would clearly violate the voters' intent to sever the portion in dispute. We thus have no other option than to affirm the district court's judgment and hold that the entire amendment based on Initiative 300 is unconstitutional.

V.

The State Officials also argue that six witness declarations, three depositions, certain deposition exhibits, and two videotape exhibits, all of which the plaintiffs offered in support of their motion for summary judgment, contained information that was not relevant to the adjudication of this case. We have considered the State Officials' objections and conclude that they are meritless.

VI.

Because we agree with the district court's decision on the grounds that Neb. Const. art. XII, § 8 violates the dormant commerce clause, we have no occasion to reach the question of whether it also violates the ADA. We note that it may become necessary to address that question if the plaintiffs pressing the ADA claim move for and receive attorneys' fees in the district court. Until that happens, however, we see no reason to rule on the question of the applicability and effect of the ADA in the current circumstances of the case.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,	)	
Plaintiffs,	)	**CASE NO. 8:04CV645**
	)	
vs.	)	
JOHN GALE, et al.,	)	**MEMORANDUM**
	)	**AND ORDER**
Defendants.	)	

(Filed: 12/15/2005)

This matter is before the Court on the Defendants' Motion for Summary Judgment (Filing No. 68), and the Plaintiffs' Motion for Summary Judgment (Filing No. 82). For the reasons stated below, both motions will be granted in part and denied in part.

PROCEDURAL BACKGROUND

Plaintiffs Jones, *et al.*, have challenged the constitutionality of Neb. Const. art. XII, § 8 ("Initiative 300"), alleging that its enforcement violates the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause of the United States Constitution, as well as 42 U.S.C. § 1983, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). (Complaint, ¶ 12, Filing No. 1, 4:04cv3194). They seek declaratory and injunctive relief against two Defendants: Nebraska Attorney General Jon Bruning in his official capacity, and Nebraska Secretary of State John Gale in his official capacity.

The Defendants have moved for summary judgment, alleging that the Plaintiffs do not have standing to argue that Initiative 300 violates the Commerce Clause; Initiative 300 does not violate the Commerce Clause; certain of the Plaintiffs do not have standing to bring a Privileges and Immunities claim; Initiative 300 does not violate the Equal Protection Clause; the Plaintiffs have failed to establish a claim under 42 U.S.C. § 1983; certain Plaintiffs lack standing to bring a claim under the ADA; and one Plaintiff's claim under the ADA lacks merit. The Plaintiffs have moved for summary judgment, alleging that Initiative 300 does violate the Commerce Clause, the ADA, the Privileges and Immunities Clause, and, as a result, the Plaintiffs' rights under 42 U.S.C. § 1983.

STANDARD OF REVIEW

Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Philip v. Ford Motor Co.*, 328 F.3d 1020, 1023 (8th Cir. 2003). The proponent of a motion for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed.R.Civ.P. 56(c)). The proponent need not, however, negate the opponent's claims or defenses. *Id.* at 324-25.

In response to the proponent's showing, the opponent's burden is to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). A "genuine" issue of material fact is more than "some metaphysical doubt as to the material facts." *Id.* at 586.

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable ... or is not significantly probative ... summary judgment may be granted." *Id.* at 249-50 (citations omitted).

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

CONSTITUTIONAL AND STATUTORY FRAMEWORK

Neb. Const. art. XII, § 8, popularly known as "Initiative 300," states, in part: "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." Initiative 300 defines "farming or ranching" as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Initiative 300 provides a wide variety of exceptions to its general prohibition, including an exception for "family farm or ranch corporation[s]." *Id.* at (1)(A). A "family farm or ranch corporation" is defined as:

> a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

Id. Initiative 300 provides a similar family-limited-partnership exemption, requiring that at least one of the partners be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch. . . . " The Nebraska Supreme Court has interpreted the term "actively" to mean "constantly engaged," and the language "engaged in the day to day labor and management" as requiring that "such person be involved on a daily or routine basis in *all* aspects of the farm or ranch activities, be it labor or management." *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 428 (Neb. 2000), emphasis added. According to the Nebraska Supreme Court, "[l]abor would encompass the physical chores attendant to the farm," and should be understood as "associated with physical activity," and meaning " 'work, esp. of a hard or fatiguing kind; toil.' " *Id.* " 'In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature.' " *Id.*, quoting *American Surety Co. of New York v. Stuart*, 151 S.W.2d 886, 887 (Tex.App. 1941).

The Plaintiffs allege that Initiative 300 violates the Commerce Clause of the United States Constitution, which provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States. . . . " U.S. Const. art. I, § 8, cl.3. The dormant Commerce Clause is the negative implication of the Commerce Clause, pursuant to which states may not enact laws that discriminate against or unduly burden interstate commerce. *Quill v. North Dakota*, 504 U.S. 298, 312 (1992).

Certain of the Plaintiffs also allege that Initiative 300 violates the Privileges and Immunities Clause, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," (U.S. Const. art. IV, § 2), and the Equal Protection Clause, which provides: "No State shall . . . deny to any person within its jurisdiction equal protection of the law," (U.S. Const. amend. 14, § 1).

Initiative 300 requires the Nebraska Secretary of State to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations." If the Nebraska Attorney General has reason to believe that a corporation or syndicate is violating the terms of Initiative 300, the Attorney General is required to "commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of [Initiative 300]." Consequently, the Plaintiffs brought their action, seeking declaratory and injunctive relief, against Nebraska Secretary of State John Gale and Nebraska Attorney General Jon Bruning, in their official capacities; and certain of the Plaintiffs claim that Initiative 300's alleged constitutional infirmities also give rise to a cause of action against Gale and Bruning under 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Finally, two Plaintiffs allege that Initiative 300's requirement that at least one family member holding stock in a family farm or ranch limited-liability entity be "a person residing on or actively engaged in the day to day labor and management of the farm or ranch," violates their rights under the ADA, which provides that "no qualified person with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. These Plaintiffs contend that Initiative 300 must yield to the ADA, based on the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl.2, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

FACTS

Objections to the Evidentiary Record

Although all the Defendants and Plaintiffs have moved for summary judgment, alleging that there is no genuine issue of material fact, the parties have submitted extensive objections to each other's evidentiary records. (Defendants' Objections to Plaintiffs' Indexes of Evidence, Filings No. 80 and 89; and Plaintiffs' Objections to Defendants' Index of Evidence, Filing No. 101). In general, when an evidentiary record consists of thousands of pages of documents, giving rise to hundreds of objections, it may safely be assumed that there are genuine issues of material fact precluding summary judgment. In this case, however, the core issues are much more straightforward than the evidentiary record would indicate. As the Plaintiffs have noted, much of the documentary evidence submitted by the Defendants purports to show that Initiative 300 does not have a discriminatory effect on interstate commerce – a fact-intensive issue not pursued by the Plaintiffs in their Motion for Summary Judgment.

The hundreds of objections raised to the parties' respective evidentiary records fall into five basic categories: relevance, foundation, hearsay, conclusions of law, and improper expert testimony. I will not consider materials in the evidentiary record that are irrelevant to the issues presented in the parties' motions, nor will I consider materials that lack proper foundation, consist of inadmissible hearsay, present conclusions of law, or purport to offer expert testimony. The evidentiary materials specifically cited within this Memorandum and Order are materials that I find unobjectionable for the purpose for which they are offered, and that support a finding of fact about which there is no genuine dispute.

Undisputed Material Facts

The following facts, material to the resolution of the issues before the Court and affecting *all* Plaintiffs, are undisputed based on the statements of fact in the parties' briefs, and such facts are properly supported by the parties' indexes of evidence as referenced in the briefs.[1] Undisputed material facts specific to particular Plaintiffs will be set forth in the analysis section, below.

Initiative 300 originated as a constitutional amendment proposed through the initiative petition process and appeared as a ballot question on Nebraska's 1982 general election ballot. A ballot title and explanatory statement were prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State. As defined by law, the purpose of the ballot title was to express the purpose of the measure in up to one hundred words. The ballot title submitted to Nebraska voters with regard to Initiative 300, stated, in part: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?" The purpose of the statement was to explain the effect of a vote for or against the measure. The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." The Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election. Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed. The Initiative process allowed a challenge by any person who was dissatisfied with the ballot title provided by the Attorney General. No challenge to the Initiative 300 ballot title was filed in the district court asking for a different title. Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution upon the issuance of a proclamation by the Governor on November 29, 1982.

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[1] The Defendants' statement of facts is not disputed, (Defendants' Brief, Filing No. 69, pp. 7-11; Plaintiffs' Brief, Filing No. 78, p. 8). The Defendants do dispute certain portions of the Plaintiffs' statement of facts with respect to the alleged impact of Initiative 300 on the Plaintiffs' finances or business operations, and with respect to the alternatives available to the Plaintiffs under Initiative 300 to achieve their business goals. (Plaintiffs' Brief, Filing No. 83, pp. 6-17; Defendants' Brief, Filing No. 91, pp. 3-5).

ANALYSIS

I. Standing

To establish standing, a plaintiff must have suffered an injury in fact that is (1)(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) traceable to the defendant's challenged action; and (3) likely to be redressed by a favorable decision. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (hereafter *"Hazeltine II"*), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992). If a plaintiff does not show an injury that is concrete, particularized, and actual or imminent, the plaintiff lacks standing to assert a claim, and a court is without subject matter jurisdiction over such an action. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002).

Jim Jones

Plaintiff Jim Jones resides near Eddyville, Nebraska, and has been actively engaged in farming and ranching for over 40 years. To get started in his farming and ranching business in 1963, Jones entered into a business arrangement with an unrelated older farmer/rancher. In 1977, prior to the adoption of Initiative 300, the older farmer/rancher's land was transferred to a new corporation in exchange for corporate stock and Jones was allowed to purchase up to 48 per cent of the stock in the corporation, as long as the older farmer/rancher was living. Jones and his family now own all of the corporation's stock. (Complaint, Filing No. 1, ¶¶ 4, 30; Defendants' Brief, Filing No. 69, p. 9; Plaintiffs' Brief, Filing No. 78, p. 5; Declaration of Jim Jones, Filing No. A79 ("Jones Decl.") ¶¶ 2, 3, 6).

In 1988, Jones's son Gordon wanted to begin a career in farming and ranching in Nebraska by entering into a similar arrangement with an older, established farmer, but was prevented from forming such a corporation due to Initiative 300. Because Gordon could not establish a corporation with the older farmer/rancher, Jones's corporation was prevented from doing business with or merging with the corporation that Gordon could not form. (Jones Decl. ¶ 7).

Jones served as a Nebraska state senator from 1993 to 2005, and introduced legislation to provide increased opportunities for young Nebraskans wishing to begin a career in farming and ranching. The bills he proposed were met with "stiff resistance" and "killed in committee" by opponents who claimed that Jones's proposed legislation would violate Initiative 300. (Jones Decl. ¶¶ 2, 4, 8).

Jones contends that he has suffered an injury that gives him standing to challenge Initiative 300 because (1) individually[2] and as a majority shareholder in his family corporation, he cannot contract with non-qualifying out-of-state corporations for the purpose of raising and feeding livestock for slaughter, causing him loss of income; (2) farm and ranch land that Jones owns personally and as a majority shareholder in his family farm corporation has diminished in value because potential purchasers of the land are non-qualifying corporations prohibited by Initiative 300 from owning the land; (3) he cannot sell his stock in the family farm corporation to a person or entity that does not qualify under Initiative 300, thus reducing the value of his corporate stock; and (4) Initiative 300 generally impedes his ability to contract, compete, borrow funds, convey assets, plan his estate, and assist younger farmers in establishing their careers. (Jones Decl. ¶¶ 9-19).

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[2] Jones states that he owns Nebraska farm and ranch land personally as well as through the family farm corporation. (Jones Decl. ¶ 11.)

The Defendants contend that Jones lacks standing to pursue his claims because Initiative 300 does not apply to individuals and because Jones's action is not a derivative action on behalf of any corporation. It is true that third parties do not have standing to assert the rights of legal interests of others in order to obtain relief from injury to themselves. *Hazeltine II*, 340 F.3d at 591, citing *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997). Therefore, to the extent that Jones purports to make any claim on behalf of his son, his family corporation, or the younger farmers he would like to assist, Jones lacks standing to pursue such claims. Similarly, Jones's status as a former state senator who was unsuccessful in promoting certain legislation provides him with no standing to challenge Initiative 300.

Jones has also alleged, however, that *he* has suffered certain injuries that are (1)(a) concrete and particularized and (b) actual or imminent; (2) traceable to the enforcement of Initiative 300; and (3) subject to redress by a favorable decision. While Initiative 300 does not prohibit Jones from engaging in farming and ranching, it does prevent him from entering into contracts that he otherwise would enter into with out-of-state corporations for such activities as the raising and feeding of livestock for slaughter, allegedly causing Jones personal financial loss. As an individual owner of farm and ranch land, Jones allegedly has suffered a loss of real estate and business value due to Initiative 300's exclusion of potential buyers from the market, reducing his borrowing power and prohibiting him from transferring ownership of his property as he wishes. Similarly, as a stockholder in a family farm corporation, Jones allegedly has suffered a loss of value in his stock due to Initiative 300's exclusion of potential buyers from the market, also reducing his borrowing power and prohibiting him from transferring ownership of his property – the stock –as he wishes.

The Eighth Circuit Court has made clear the fact that a plaintiff has standing to challenge the constitutionality of a law that has a negative effect on the plaintiff's borrowing power, financial strength, and fiscal planning (*Hazeltine II*, 340 F.3d at 592, citing *Clinton v. City of New York*, 524 U.S. 417, 431 (1998)), or when the law denies the plaintiff business opportunities (*id.*, citing *Lepelletier v. FDIC*, 164 F.3d 37, 42 (D.C. Cir. 1999)). I conclude that Jones has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause based on his alleged, personal injuries-in-fact.

Terrence M. Schumacher

Plaintiff Terrence M. Schumacher is a Colorado resident who owns an interest in Nebraska farmland in five counties. (Declaration of Terrence M. Schumacher, Filing No. A79 in 04cv645, Ex. 4 ("Schumacher Decl.") ¶¶ 2, 4). Neither he nor any of his relatives resides on the farmland, nor performs day-to-day labor on the land, nor manages it. (*Id.* ¶ 4). Schumacher wants to transfer his farmland to a limited liability entity to take advantage of favorable estate planning tools and to limit his exposure to personal liability, including tort liability. He also wants to pool his Nebraska farm assets with those of his other relatives who own Nebraska farmland, to form a single, more efficient operating unit. (*Id.* ¶ 5). Initiative 300 allegedly prevents him from transferring his farmland as he wishes, reduces his borrowing power, and impairs his ability to contract and compete in a national market. (*Id.* ¶¶ 6-12). He further alleges that Nebraska residents who qualify for the family farm exemption under Initiative 300 are not similarly burdened. (*Id.* ¶¶ 10-12). I conclude that Schumacher has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause based on his alleged injuries-in-fact.

Shad Dahlgren

Plaintiff Shad Dahlgren is a Nebraska resident (Complaint, ¶ 6) who owns a minority interest in a family farm corporation that operates a cattle feedlot in Nebraska. (Affidavit of Shad Dahlgren, Filing No. A79, Ex. 6 ("Dahlgren Aff.") ¶ 2). Dahlgren is also paraplegic and permanently confined to a wheelchair. (*Id.* ¶¶ 4-5). Dahlgren contends that, as a result of his disability, he cannot perform day-to-day labor and management needed to operate the family feedlot and consequently cannot become a majority owner of the family farm corporation unless related shareholders reside on the farm or are actively engaged in its day-to-day management. (*Id.* ¶¶ 7-9). Dahlgren has desired and currently desires to purchase a row-crop farm with other investors, holding ownership in a corporation to limit his liability. (*Id.* ¶¶ 12-15). Dahlgren contends that Initiative 300 precludes him from engaging in such economic activities because his physical disability prevents him from performing day-to-day labor on the farm, and his need for medical care prevents him from residing on the farm. (*Id.* ¶¶ 16, 18). I conclude that Dahlgren has standing to challenge Initiative 300 under the Commerce Clause, the Equal Protection Clause and the ADA.

Harold G. Rickertsen

Plaintiff Harold G. Rickertsen is a Nebraska resident who retired from farming and ranching in 2000. (Declaration of Harold G. Rickertsen, Filing No. A79, Ex. 2 ("Rickertsen Decl.") ¶ 2). He still owns his farmland as a sole proprietor, renting it to others. (*Id.*). Rickertsen wants to make use of his management experience by forming a farm corporation and transferring a minority interest in his farm to a younger, unrelated farmer, while maintaining an active management role. (*Id.* ¶¶ 9-11). Rickertsen contends that Initiative 300 has prevented him from entering into such a business relationship; reduced the number of eligible buyers for his land; limited his borrowing power; impaired his financial and estate-planning options; and restricted his access to national real estate, grain and livestock markets, because he is precluded from contracting with non-qualifying out-of-state corporate entities; all to his financial detriment. (*Id.* ¶¶ 12-15). I conclude that Rickertsen has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause, based on his alleged injuries-in-fact.

Todd Ehler

Todd Ehler is a resident of Nebraska who provided management services and periodic labor for his family's diversified farm until 2000. (Declaration of Todd Ehler, Filing No. A79, Ex. 5 ("Ehler Decl.") ¶¶ 2-3). Ehler suffers from neuropathy in his hands, feet, and legs, as well as significant muscle loss, weakness, and loss of balance. (*Id.* ¶¶ 5-6). As a result of his physical disabilities, Ehler is unable to perform the day-to-day physical labor necessary in typical farming, ranching or feedlot operations, and cannot provide the day-to-day labor needed to operate his family's farm. (*Id.* ¶ 8). Ehler's "intended arrangement" is to form a limited liability company with a neighboring farmer through which Ehler would provide management and marketing services for the farming operation as the majority owner, and the neighbor would provide the day-to-day care and feeding of livestock as well as the labor for production of grain. (*Id.* ¶ 9). Ehler alleges that, because of the restrictions in Initiative 300 combined with his physical disabilities that prevent him from performing day-to-day farm labor, he cannot form such a limited liability corporation with a non-relative; nor can he be the sole stockholder in a farm corporation. (*Id.* ¶¶ 10-12). As a result, Ehler contends that he suffers loss of economic opportunities and benefits that are available to non-disabled individuals. (*Id.* ¶¶ 17-18). I conclude that Ehler has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause, the Equal Protection Clause, and the ADA.

Robert E. Beck, III

Plaintiff Robert E. Beck, III, ("Beck") is a cattle rancher who resides in Buffalo County, Nebraska, where he also owns a commercial cattle feeding operation. (Declaration of Robert E. Beck, III ("Beck Decl."), Filing No. 79, Ex. 3, ¶ 2). Many of his customers reside outside

Nebraska. (*Id.*). Beck wants to contract with out-of-state corporate entities and limited liability partnerships that own cattle, but alleges that Initiative 300 prohibits him from doing so. (*Id.* ¶ 3). Some of Beck's existing customers have formed limited liability entities to own feeder cattle, but such entities allegedly cannot own the cattle fed in Nebraska, due to the restrictions of Initiative 300. (*Id.*). Consequently, Beck has lost business and income, has suffered reduced borrowing power, and has been restricted from access to national cattle markets. (*Id.* ¶¶ 3-12). I conclude that Beck has standing to challenge the constitutionality of Initiative 300 under the Commerce Clause and the Equal Protection Clause.

II. Commerce Clause

Under the Commerce Clause, Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). "Farming or ranching" is defined in Initiative 300 as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Producing, maintaining, and adding value to such farm commodities are activities that substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 118-19 (1942) (Commerce Clause applied to production of wheat, even though production was only intended for consumption on the farm). Initiative 300 also affects other activities related to interstate commerce, by placing restrictions on the rental and sale of agricultural real estate. The rental of real estate is "unquestionably" an activity affecting interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985). A number of courts have also recognized that the sale of real estate is an activity affecting interstate commerce, and that state laws or regulations governing the sale of real estate are subject to dormant Commerce Clause analysis, even though real estate itself is incapable of physical movement in commerce. *See, e.g., Old Coach Development Corp., Inc. v. Tanzman*, 881 F.2d 1227, 1232 (3rd Cir. 1989); *Cranberry Hill Corp. v. Shaffer*, 629 F.Supp. 628, 630-36 (E.D.N.Y. 1986) ("An item of commerce need not cross state lines to fall within the Commerce Clause's protection if its sale . . . will have an economic impact out-of-state.") *Id., at* 631, citing *Wickard, supra.*

"A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First the court considers whether the challenged law discriminates against interstate commerce." *Hazeltine II*, 340 F.3d at 593. The Supreme Court has said, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 125 S.Ct. 1885, 1895 (2005), quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994). "State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Id.* at 1897, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,'" the Supreme Court has "'generally struck down the statute without further inquiry.'" *Id.* at 1904, quoting *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). Only if a state can demonstrate that such a law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," will it withstand scrutiny under the Commerce Clause. *Id.* at 1905, citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

If a statute is not discriminatory, however, a second tier of analysis is warranted. Such a statute will be struck down under the dormant Commerce Clause only if the burden it imposes on interstate commerce is clearly excessive in relation to its putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This *Pike* balancing test need not be conducted if the statute is struck down under the first tier of analysis. *Hazeltine II*, 340 F.3d at 597 n. 9.

A. Does Initiative 300 Discriminate Against Interstate Commerce?

The Supreme Court has recognized three indicators of discrimination against out-of-state interests. "First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose." *Hazeltine II*, 340 F.3d at 593, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Second, "a law could facially discriminate against out-of-state interests." *Id.*, citing *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992). "Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is it could have a discriminatory effect." *Id.*, citing *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986).

The parties have stipulated that the issue of whether Initiative 300 has had a discriminatory *effect* on interstate commerce is fact-intensive and not appropriate for resolution on summary judgment. See Report of Parties' Planning Conference (Filing No. 14) ¶¶ 3, 6, 12. To the extent that evidentiary materials have been submitted purporting to show how the adoption of Initiative 300 has in fact affected interstate commerce, I have not considered such materials.[3] However, I also recognize that the three indicators of discrimination against interstate commerce are not necessarily discrete, but are often overlapping. For example, if it is patently obvious from the *language* of a law that its *effect* will be to discriminate against out-of-state interests, then it may be inferred that those who drafted, promoted, and voted to adopt the law had a discriminatory *purpose*.

1. Does Initiative 300 have a discriminatory purpose?

With respect to the *purpose* underlying the adoption of Initiative 300, the Plaintiffs refer the Court to the ballot title and explanatory statement for Initiative 300, as well as testimony regarding the historical background and sequence of events leading to its adoption.

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[3] As discussed, *infra*, it is also unnecessary for me to consider such materials in connection with the "*Pike* balancing test," weighing whether the burden that Initiative 300 imposes on interstate commerce is clearly excessive in relation to its putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The ballot title submitted to voters said: "Shall a constitutional prohibition be created prohibiting ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a *Nebraska family farm* corporation. . . . ?" (Filing No. 70-1, Ex. 1C, emphasis added). The explanatory statement presented to Nebraska voters preceding the ballot title said: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a *Nebraska family farm* corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land." (*Id.*, emphasis added). There is also substantial evidence in the record that the purpose underlying Initiative 300, as expressed to voters through speeches, radio broadcasts, and news articles during the petition process and preceding the ballot vote, was to prevent the purchase of Nebraska farm and ranch land by "outside investors,"[4] and "rich out-of-state corporations."[5]

The Defendants argue that only the language of Initiative 300 itself, and its ballot title and explanatory statement, should be used to determine the purpose of the constitutional amendment. They contend that, unlike the legislative history of a statute, the historical background of a petition initiative for a constitutional amendment is irrelevant.[6] The Eighth Circuit Court of Appeals, however, has said otherwise. *Hazeltine II,* 340 F.3d at 593-94. Following the guidance of that Court, as I must do, the "Plaintiffs have the burden of proving discriminatory purpose . . . and can look to several sources to meet that burden," including "direct evidence that the drafters of [an initiative] or the [state] populace that voted for [an initiative] intended to discriminate against out-of-state businesses." *Id.,* citing *SDDS, Inc. v. South Dakota,* 47 F.3d 263, 268 (8th Cir. 1995). While I recognize that the direct evidence of discriminatory purpose in this case may not be as strong as that in *Hazeltine II,* there is substantial evidence to support the premise that Initiative 300 was conceived and born in a protectionist fervor.[7] The ballot title and the language of Initiative 300 alone are persuasive evidence that Initiative 300 had a discriminatory purpose. The ballot title, and the language of Initiative 300 defining limited-liability-entity exemptions for family farms and ranches, clearly indicate that people living and working in Nebraska, and their families, will be given be favored treatment. A discriminatory purpose on the part of the drafters or voting populace, within the meaning of the dormant Commerce Clause, can be inferred from that language.

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[4] Deposition of Neil Oxton, Filing No. A79, Ex. 8, 40:4-17, and Depo. Exhibit 12, appearing within Exhibit 11 to Filing A79.

[5] Filing A79B, Ex. 12. (I note that Exhibit 12 at Filing A79A is the video of the I-300 Commercial-Center for Rural Affairs, while Exhibit 13 at Filing !79B is the video of the I-300 Celebration at Grand Island on December 5, 1991. There are discrepancies in the numerical references to these exhibits in the briefs.)

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[6] I recognize that when addressing challenges to Initiative 300, the Nebraska Supreme Court has said: "There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment." *Omaha Nat'l Bank v. Spire,* 389 N.W.2d 269, 279 (Neb. 1986). See also *Pig Pro Nonstock Cooperative v. Moore,* 568 N.W.2d 217, 223-24 (Neb. 1997).

[7] The historical background of Initiative 300 discloses that its adoption was the culmination of efforts to restrict Nebraska land ownership by out-of-state corporations, including Prudential Insurance Company of New Jersey, and that the debate and publicity leading to Initiative 300 was replete with protectionist rhetoric. Filing No. A79, Ex. 8-13.

2. *Does Initiative 300 facially discriminate against out-of-state interests?*

When a similar state constitutional amendment was challenged in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 202 F. Supp. 2d 1020 (D.S.D. 2002) (hereafter "*Hazeltine I*"), the district court chose not to "cross the 'first tier bridge'" and instead relied "on the so-called 'second tier' approach, the *Pike v. Bruce Church, Inc.* balancing test" in finding that South Dakota's constitutional amendment was in violation of the dormant Commerce Clause. *Id.* at 1049. The Eighth Circuit Court found that the amendment in question had an underlying discriminatory *purpose,* and, therefore, did not consider whether it was discriminatory on its *face. Hazeltine II,* 340 F.2d at 593.

In *Smithfield Foods, Inc. v. Miller,* 241 F. Supp. 2d 978 (S.D. Iowa 2003) (hereafter "*Smithfield I*"), the district court considered the constitutionality of a statute that prohibited certain pork processors from owning or controlling pork production in the state, while making exceptions for certain Iowa cooperative associations with members actively engaged in farming. The district court held that the statute, on its face, discriminated against interstate commerce because it provided different treatment for in-state interests and out-of-state interests, benefitting the former and burdening the latter. *Id.* at 990. The court noted that the statute was no less discriminatory simply because some in-state interests were burdened and some out-of-state interests were not. *Id.* at 990-91, citing *C&A Carbone, Inc. v. Clarkstown,* 511 U.S. 383, 391 (1994). The district court also concluded that the statute was enacted with a "discriminatory purpose to achieve a discriminatory effect." *Id.* at 992. Because the statute in question was amended pending appeal, it is not known whether the Eighth Circuit Court would have agreed with the district court's analysis regarding facial discrimination. *Smithfield Foods, Inc. v. Miller,* 367 F.3d 1061, 1066 (8th Cir. 2004) (hereafter "*Smithfield II*"). I agree with the court's reasoning in *Smithfield I,* recognizing facial discrimination under the dormant Commerce Clause, and I find that reasoning equally applicable to Initiative 300.[8]

The Plaintiffs' affidavits illustrate,[9] and I take notice of the fact, that businesses operating as limited liability entities may have many advantages that individual business owners do not have. These advantages may include opportunities for raising capital, obtaining financing, transferring assets, and shareholder estate planning, in addition to limited shareholder liability. I also recognize that if limited liability companies are permitted to engage in agricultural endeavors without restriction, the competition they present for traditional farmers and ranchers may lead to profound changes in a state's rural economy and culture. If a state places restrictions on *who* can benefit from an advantageous business arrangement, however, I am obligated to inquire whether the restrictions unfairly favor in-state economic interests.

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[8] There is a danger that facial discrimination, like beauty, may lie in the eye of the beholder. It is important, therefore, for a court to describe the factors that lead it to conclude that a law *on its face* discriminates against interstate commerce.

[9] Jones Decl. ¶¶ 9-19; Schumacher Decl. ¶¶ 5-12; Dahlgren Aff. ¶¶ 12-15; Rickertson Decl. ¶¶ 12-15; Ehler Decl. ¶¶ 17-18; Beck Decl. ¶¶ 3-12.

Initiative 300's general prohibition against farming or ranching by corporations and syndicates *does not* apply to family farm or ranch corporations or limited partnerships in which at least one family member "is a person residing on or actively engaged in the day to day labor and management of the farm or ranch."[10] Initiative 300 on its face, therefore, favors Nebraska residents, and people who are in such close proximity to Nebraska farms and ranches that a daily commute is physically and economically feasible for them. Corporations and limited partnerships that satisfy all the requirements of a family-farm corporation or family-farm limited partnership, but do not have a family member residing on the farm or engaged in on-site day-to-day physical labor and management, cannot own farm or ranch land; nor cultivate land; nor own, keep or feed livestock in Nebraska.

Some non-Nebraska residents living across the border from their Nebraska farmland may qualify for the family farm exceptions, while some Nebraska residents living at a great distance from their farmland may not. That fact does not save Initiative 300 from facial discrimination.

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[10] A shareholder is not actively engaged in the day-to-day labor and management of the farm or ranch unless he or she is "involved on a daily or routine basis in all aspects of the farm or ranch activities, be it labor or management. Labor would encompass the physical chores attendant to the farm, and management would encompass the mental and business activities of the operation." *Hall v. Progress Pig, Inc.*, 610 N.W.2d 420, 428 (Neb. 2000).

The Supreme Court has found that legislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification.[11]

Because most case law on the subject of the dormant Commerce Clause concerns movable products rather than land, Initiative 300's facial discrimination may be most readily apparent in its reference to "the ownership, keeping or feeding of animals for the production of livestock or livestock products." Initiative 300 discriminates against livestock based on origin, *i.e.,* those owned by corporations or limited partnerships that do not satisfy the Initiative 300 exemptions. Such discrimination based on origin causes a state to "isolate itself from the national economy," and constitutes facial discrimination under the dormant Commerce Clause. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353, 361 (1992).

Although the Defendants argue that Initiative 300's treatment of in-state economic interests and out-of-state economic interests should be considered under a "discriminatory effect" analysis, necessitating a fact-intensive review, I disagree. When it is apparent from the language of a statute, or a state constitutional amendment, that its effect is to burden out-of-state economic interests and benefit in-state economic interests, the party challenging it should not be required to bear the burden of an evidentiary hearing to prove the obvious.

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[11] In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* 504 U.S. 353 (1992), the Court struck down a statute that allowed counties to ban out-of-county waste at their landfills. In *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951), the Court struck down an ordinance that made it unlawful to sell milk as "pasteurized" unless it had been processed at a plant within a radius of five miles from the central square of Madison. In *Brimmer v. Rebman,* 138 U.S. 78 (1891), the Court struck down an inspection fee on meat from animals slaughtered more than 100 miles from the place of sale. The fact that these laws burdened some in-state interests, or included some out-of-state interests in their favored classification, did not save the laws from being facially discriminatory under the dormant Commerce Clause.

B. *Is Initiative 300 Nebraska's Exclusive Means of Advancing Legitimate Local Interests?*

My findings that Initiative 300 had a discriminatory purpose and facially discriminates against interstate commerce, by treating out-of-state economic interests less favorably than in-state economic interests, does not end the Commerce Clause inquiry. Subjecting Initiative 300 to the "strictest scrutiny" I may uphold its constitutionality under the Commerce Clause if the Defendants can establish that they have "'no other means to advance a legitimate local interest.'" *Smithfield II,* 367 F.3d at 1065, quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994); see also *Hazeltine II,* 340 F.3d at 596-97, citing *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.,* 511 U.S. 383, 392 (1994).

In attempting to address the question of whether Initiative 300 advances a legitimate local interest that can be advanced through no other means, the Defendants assert that:

> [T]he intent of Initiative 300 was to "retain and promote family farm operations in Nebraska and . . . to prevent a perceived threat that would stem from unrestricted corporate ownership of

> Nebraska farmland by preventing concentration of farmland in the hands of non-family corporations." *MSM Farms, Inc. [v. Spire]*, 927 F.2d [330] at 333 [(8th Cir. 1991)]. Some of the perceived threats included absentee owners of land, negative effects on the social and economic culture of rural Nebraska, and a lack of good stewardship of the state's land, water, and natural resources. *Id.*
>
> If the perceived threat is the ownership of farmland by corporations, there appears to be no less restrictive way to cease the ownership of farmland by corporations than an out-right prohibition. In drafting Initiative 300, it appears the drafters did not believe family farm corporations, one of the family members of which lived or worked on the farm, posed the same threats as a traditional corporation and thereby exempted Family Farm Corporations from the prohibition.

Defendants' Brief, Filing No. 69, p. 30.

The Defendants also list seven "concerns" of Nebraska citizens regarding non-family corporate ownership of farm and ranch land leading to the adoption of Initiative 300: (1) economic competition, (2) reduced stewardship of natural resources, (3) reduced participation in local government and volunteer activity, (4) vertical integration of agricultural production, (5) efficiencies of scale reducing demand for labor, (6) reduced demand for products and services from local businesses, and (7) reduced availability of land for purchase upon death or retirement of the resident owner. Defendants' Brief, Filing No. 91, p. 22.

Some of these local interests sought to be advanced by Initiative 300 are in fact protectionist interests, appearing to confirm that a discriminatory purpose motivated the adoption of the Initiative. *Id.* Recognizing that the conservation of natural resources and the promotion of rural economic development are legitimate local interests,[12] the next question is whether such interests can be advanced through no other means. For example, if the drafters' concern was conservation of natural resources, one might question whether environmental regulations were considered as a less drastic and perhaps more effective alternative. If the drafters' concern was the potential abuse of limited liability status, one might question whether mandatory liability insurance was considered as a less drastic and perhaps more effective alternative. If the drafters' concern was the promotion of local economic development, one might question whether requiring family farm and ranch limited-liability entities to hire resident managers or to lease to qualified tenants was considered as a less drastic and perhaps more effective alternative.

As in *Hazeltine I* and *Hazeltine II*, there is no evidence that the drafters of Initiative 300 made any attempt to measure its probable effects or the probable effects of less drastic alternatives. See *Hazeltine II,* 340 F.3d at 595. The Defendants, therefore, have not met their burden of proving that Initiative 300 is the exclusive means of advancing legitimate local interests.

III. Privileges and Immunities Clause

Under the Privileges and Immunities Clause, citizens have a right to be free from discrimination based on their state of citizenship or residence. That right, however, is not absolute. For example, the Privileges and Immunities

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[12] *MSM Farms, Inc. v. Spire,* 927 F.2d 330, 333 (8th Cir. 1991).

Clause provides protection for non-residents in the areas of procuring medical services and engaging in commercial activity, but does not prevent a state from requiring non-residents to pay more for hunting licenses or tuition at state universities. *Saenz v. Roe,* 526 U.S. 489, 502 (1999). Similarly, the Privileges and Immunities Clause prevents states from imposing unreasonable burdens on citizens of other states in their pursuit of employment, their ownership and disposition of private property within the state, and their access to the courts, but *not* in areas of voting and qualification for public office. *Baldwin v. Fish and Game Comm'n of Montana,* 436 U.S. 371, 383 (1978).

Schumacher argues that "[b]ecause of his residency, he is precluded from performing the day to day labor and management of the farmland that he owns in Nebraska." (Plaintiffs' Brief, Filing No. 83, p. 55[13]). He also alleges that he cannot qualify for the exemptions from Initiative 300's restrictions "based on his residency and the residency of members of his family." (*Id.* at 59). He contends that Initiative 300's restrictions implicate fundamental rights, because they affect his ability to do business and pursue a common calling.[14] It is not his Colorado residency or citizenship that precludes him from performing day-to-day labor on his Nebraska farmland, however, but his physical location and the physical location of his family members. As the Defendants note, the same restriction is imposed on Nebraska citizens or residents who do not live within commuting distance of their farmland.[15]

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[13] Page references are to the CM/ECF document, not internal pagination.

[14] See *United Building and Construction Trades Council v. Camden,* 465 U.S. 208, 219 (1984).

If a state law discriminates against an out-of-state citizen based on his or her citizenship or residency, then a court must inquire (1) whether the law burdens a privilege and immunity protected by the clause, and if so, (2) whether there is substantial reason for discrimination against citizens of the other state. *United Building and Construction Trades Council v. Camden,* 465 U.S. 208, 218 (1984). Initiative 300 does not discriminate against Schumacher as an individual based on his citizenship or residency, although it does discriminate against *out-of-state economic interests.* Because Schumacher has not suffered discrimination because of his citizenship or residency, past or present, his Privileges-and-Immunities claim must fail.

IV. Equal Protection Clause

The Defendants have moved for summary judgment on the Plaintiffs' Equal Protection claim, citing *MSM Farms, Inc.,* 927 F.2d at 332, and arguing that it is settled law in the Eighth Circuit that Initiative 300 does not violate the Equal Protection Clause. The Plaintiffs have not moved for summary judgment on their Equal Protection Claim, but assert that the classifications challenged in this action are different from the classifications challenged in *MSM Farms,* and that the Defendants' motion should be denied because genuine issues of material fact remain.

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[15] I recognize that a law discriminating against in-state residents as well as out-of-state residents may violate the Privileges and Immunities Clause. In *Camden,* 465 U.S. at 217-18, the Supreme Court found that a city ordinance giving employment preference to city residents violated the Privileges and Immunities Clause, even though it discriminated against certain in-state residents as well as all out-of-state residents. It is doubtful that the Supreme Court would have reached the same result if the ordinance had simply required city employees or contract workers, whatever their residence or citizenship might be, *to appear for work* in the city of Camden.

In *MSM Farms,* the Eighth Circuit Court noted that Initiative 300 involved no suspect classifications or fundamental rights, and therefore its varying treatment of different groups or persons did not violate the Equal Protection Clause unless such treatment was so unrelated to the achievement of any legitimate purposes that it must be viewed as irrational. *Id.* at 332. It is true that the Court in *MSM Farms* was considering Initiative 300's differing treatment of family farm corporations and non-family farm corporations. The Court said: "Whether *in fact* the law will meet its objectives is not the question: the equal protection clause is satisfied if the people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an agriculture where families own and work the land." *Id.* at 333 (emphasis in original). Here, the Plaintiffs contend that the challenged classification concerns family farm corporations *with* resident farmers *vis a vis* family farm corporations *without* resident farmers.

Although the challenged classification in this case is somewhat different than that in *MSM Farms,* many of the factors that the Eighth Circuit accepted as forming a rational basis for Initiative 300's disparate treatment of family corporations and non-family corporations are equally applicable here. Favoring resident family farm corporations over non-resident family farm corporations may be said to "protect an agriculture where families own *and work* the land." *Id.* (emphasis added). Favoring resident family farm corporations may also prevent "absentee landowners and tenant operation of farms [that] would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources." *Id.*

While I find that resident family farm corporations and non-resident family farm corporations are similarly situated for purposes of owning and operating farms and ranches in the state of Nebraska, I also find that there are rational bases for the disparate treatment of the two classes.[16] Accordingly, I conclude that Initiative 300 does not violate the Equal Protection Clause and that the Defendants are entitled to summary judgment as a matter of law on the Plaintiffs' Equal Protection claim.

V. 42 U.S.C. § 1983

Because I have found that the Defendants, acting under color of state law, have denied the Plaintiffs rights secured to them under the Commerce Clause of the United States Constitution, the Plaintiffs are entitled to judgment against the Defendants in their official capacities under 42 U.S.C. § 1983, including prospective injunctive relief, and may apply for attorneys' fees under 42 U.S.C. § 1988.

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[16] Neither in this Equal Protection analysis, nor in my analysis under any other provision of the United States Constitution or federal law, am I in any way passing judgment on the public-policy merits of Initiative 300. I recognize that a myriad of public-policy arguments can be made in favor of and in opposition to Initiative 300.

VI. ADA

Title II of the ADA provides, in part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Public entity" is defined to include "any State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B). "Qualified person with a disability" is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The ADA's reference to "programs, services, or activities" of a public entity has been construed broadly, to apply to all activities of state and local governments, including the adoption of standards for real estate zoning. *Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 44-45 (2nd Cir. 1997); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 730 (9th Cir. 1999).

A plaintiff may bring a claim in federal court alleging violations of the ADA and seeking prospective injunctive relief against state officials in their official capacities. *See Randolph v. Rodgers,* 253 F.3d 342, 347-48 (8th Cir. 2001); *Gibson v. Ark. Dep't of Corr.,* 265 F.3d 718, 722 (8th Cir. 2001); *Grey v. Wilburn,* 270 F.3d 607, 609 (8th Cir. 2001).

Plaintiffs Dahlgren and Ehler are disabled[17] and, because of their disabilities, cannot perform daily physical labor on farms or feedlots.[18] Dahlgren cannot live on a farm or at a feedlot, due to his need for access to medical care. Although Ehler does not allege that his disability prevents him from living on his family farm, he is employed at a different location in a business that accommodates his physical disabilities. (Ehler Decl. ¶ 7). Ehler, therefore, faces the option of living idly on his farm where he cannot engage in productive labor, or maintaining gainful employment that accommodates his disability at a location removed from the farm. Dahlgren and Ehler, therefore, cannot work on farms or at feedlots due to their physical disabilities, and they cannot live on their farms without sacrificing their health and/or their livelihoods.

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[17] An individual is considered disabled under the ADA if he or she (1) suffers from a physical or mental impairment, that (2) affects a major life activity; and (3) the effect is substantial. *Bragdon v. Abbott,* 524 U.S. 624, 631 (1998). The impairment's impact must also be "permanent or long-term." *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 198 (2002). "Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii); 24 C.F.R. § 100.201(b).

[18] As discussed, *supra,* the Nebraska Supreme Court has interpreted the language of Initiative 300, providing an exemption for family farm and ranch limited liability entities, as requiring that "a person . . . actively engaged in the day to day labor and management of the farm or ranch" be "involved on a daily or routine basis in *all* aspects of the farm or ranch activities, be it labor or management." *Hall v. Progress Pig, Inc.,* 610 N.W.2d 420, 428 (Neb. 2000), emphasis added. The Nebraska Supreme Court has interpreted the term "labor" as "associated with physical activity," and meaning " 'work, esp. of a hard or fatiguing kind; toil.' " *Id.* " 'In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature.' " *Id.*, quoting *American Surety Co. of New York v. Stuart,* 151 S.W.2d 886, 887 (Tex. App. 1941).

The facially-neutral standards in Initiative 300 have a disparate impact on Dahlgren and Ehler, due to their disabilities. Specifically, Initiative 300 denies Dahlgren and Ehler the benefits of owning agricultural property in limited liability companies, as a result of their disabilities. Non-disabled farm owners who can live on their farms or engage in daily physical labor on their farms are not so precluded. Dahlgren and Ehler are "qualified individual[s] with a disability," under the ADA, because each is qualified to own farmland in a limited liability company, *but for* Initiative 300's prohibition. Each, by reason of his disability, has been excluded from participation in or otherwise denied the benefits of such an ownership arrangement, and thereby suffered discrimination through the application of Initiative 300.[19]

If this were a case brought under the ADA to challenge a rule, policy or practice, one might inquire whether the Plaintiffs had requested "reasonable modifications" to accommodate their disabilities under 42 U.S.C. § 12131(2). A reasonable accommodation of the Plaintiffs' disabilities might be to require that they lease their property to a qualified person, or employ such a person to reside on the property to perform day-to-day labor and management. Because it is not a mere policy or practice that is challenged, however, but a provision in the Nebraska Constitution, it is fruitless for the Plaintiffs to request an accommodation that the Defendants cannot grant.

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[19] The U.S. District Court for the District of South Dakota reached the same conclusion with respect to ADA challenges to the nearly-identical South Dakota constitutional amendment. *South Dakota Farm Bureau, Inc. v. Hazeltine,* 202 F. Supp. 2d 1020, 1039-43 (2002), rev'd on procedural grounds, *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583, 589-91 (8th Cir. 2003).

State laws and constitutional provisions are preempted by federal law when it is impossible to comply with both, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *South Dakota Min. Ass'n Inc. v. Lawrence County,* 155 F.3d 1005, 1009 (8th Cir. 1998), citing *California Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 581 (1987). Because Initiative 300 conflicts with the ADA and stands as an obstacle to the accomplishment of Congress's purposes in enacting the ADA, Initiative 300 is invalid under the Supremacy Clause of the United States Constitution. As prevailing parties under their ADA claim, Dahlgren and Ehler may apply for reasonable attorneys fees under 42 U.S.C. § 12205.

VII. Severance

Twenty-six words, stated twice within Initiative 300, gave rise to the Plaintiffs' challenge, and to this Court's conclusion that Initiative 300 does violate certain of the Plaintiffs' rights. Those words, that help define the exemptions for family-farm limited partnerships and family-farm corporations, are: "*at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch . . . .*" The final question this Court must address is whether those words or some other discrete portion of Initiative 300 can be severed to preserve the remainder.

The Nebraska Supreme Court has used a five-part test to determine whether an unconstitutional portion of a *statute* can be severed to preserve the valid portions. That court considers:

> (1) whether, absent the invalid portion, a workable plan remains; (2) whether the valid portions are independently enforceable; (3) whether the invalid portion was such an inducement to the valid parts that the valid parts would not have passed without the invalid part; (4) whether severance will do violence to the intent of the Legislature; and (5) whether a declaration of separability indicating that the Legislature would have enacted the bill absent the invalid portion is included in the act.

Jaksha v. State, 486 N.W.2d 858, 873 (1992).

Where an initiative for an amendment to the state constitution is concerned, however, the Nebraska Supreme Court has said that the constitutional parts of the initiative "may be saved only if it appears that the unconstitutional part did not constitute an inducement to the passage of the remaining amendments." *Duggan v. Beermann,* 544 N.W.2d 68, 79-80 (Neb. 1996). "Where the expressed . . . intent is not severable, the inducement cannot be anything less than entire." *Id.,* citing *Fitzgerald v. Kuppinger,* 79 N.W.2d 547, 554 (1956).

Initiative 300 could well provide a workable plan, independently enforceable, if the 26 words at issue were stricken. Corporations and syndicates would be prohibited from engaging in farming or ranching in Nebraska, with exceptions made for family-farm corporations and limited partnerships. Initiative 300 has no severance clause, however, and I cannot conclude that the residency or day-to-day-labor-and-management provisions in the family-farm exemptions were not an inducement to the passage of Initiative 300. To the contrary, based on the record before the Court, it appears that those provisions *were* an inducement to the passage of Initiative 300 and that it would do violence to the intent of the voters to sever those provisions. Because the unconstitutional portions are intertwined with the valid portions, Initiative 300 must be declared unconstitutional in its entirety.

CONCLUSION

Initiative 300 does not violate the Equal Protection Clause or the Privileges and Immunities Clause, but does violate the dormant Commerce Clause and the ADA, causing the Plaintiffs to be prevailing parties under 42 U.S.C. § 1983. The foregoing order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, the United States Court of Appeals for the Eighth Circuit may, in its discretion, permit an appeal to be taken from this order if application is made to it within ten days after the entry of the order. (28 U.S.C. § 1292(b)).

IT IS ORDERED:

1. The Defendants' Objection to Index (Filing No. 80) is denied;
2. The Defendants' Objection to Index (Filing No. 89) is denied;
3. The Plaintiffs' Objection to Index (Filing No. 101) is denied;
4. The Defendants' Motion for Summary Judgment (Filing No. 68, Case No. 8:04cv645) is granted with respect to Count II of the Complaint, alleging a violation of the Privileges and Immunities Clause; Count III of the Complaint, alleging a

violation of the Equal Protection Clause; and denied in all other respects;

5. The Plaintiffs' Motion for Summary Judgment (Filing No. 82, Case No. 8:04cv645) is granted with respect to Count I of the Complaint, alleging a violation of the Commerce Clause; Count IV, alleging a deprivation of constitutional rights under 42 U.S.C. § 1983; and Count V, alleging a violation of Americans with Disabilities Act; and denied in all other respects;
6. Any party may apply to the United States Court of Appeals for the Eighth Circuit for permission to pursue an interlocutory appeal within ten days of the date of this order;
7. Absent a timely application for interlocutory appeal, a separate Declaratory Judgment will be entered in favor of the Plaintiffs on Counts I, IV and V; a permanent injunction will issue, enjoining the Defendants from enforcing Initiative 300; and a schedule will be established for the Plaintiffs' application for attorneys' fees as permitted by 42 U.S.C. §§ 1983, 1988 and 12205.

Dated this 15th day of December, 2005.

BY THE COURT:

s/ Laurie Smith Camp
United States District Judge

Art. XII

CONSTITUTION OF THE STATE OF NEBRASKA

Sec. 8. Corporation acquiring an interest in real estate used for farming or ranching or engaging in farming or ranching; restrictions; Secretary of State, Attorney General; duties; Legislature; powers. That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

Sec. 8(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.

Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.

Syndicate shall mean any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships.

These restrictions shall not apply to:

(A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stock-holders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

These restrictions shall not apply to:

(B) Non-profit corporations.

These restrictions shall not apply to:

(C) Nebraska Indian tribal corporations.

These restrictions shall not apply to:

(D) Agricultural land, which, as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For the purposes of this exemption, land purchased on a contract signed as of the effective date of this amendment, shall be considered as owned on the effective date of this amendment.

These restrictions shall not apply to:

(E) A farm or ranch operated for research or experimental purposes, if any commercial sales from such farm or ranch are only incidental to the research or experimental objectives of the corporation or syndicate.

These restrictions shall not apply to:

(F) Agricultural land operated by a corporation for the purpose of raising poultry.

These restrictions shall not apply to:

(G) Land leased by alfalfa processors for the production of alfalfa.

These restrictions shall not apply to:

(H) Agricultural land operated for the purpose of growing seed, nursery plants, or sod.

These restrictions shall not apply to:

(I) Mineral rights on agricultural land.

These restrictions shall not apply to:

(J) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential use for nonfarming or nonranching purposes. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm or nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, not to exceed a period of five years, such land may not be used for farming or ranching except under lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(K) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of, except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(L) A bona fide encumbrance taken for purposes of security.

These restrictions shall not apply to:

(M) Custom spraying, fertilizing, or harvesting.

These restrictions shall not apply to:

(N) Livestock futures contracts, livestock purchased for slaughter, or livestock purchased and resold within two weeks.

If a family farm corporation, which has qualified under all the requirements of a family farm or ranch corporation, ceases to meet the defined criteria, it shall have fifty years, if the ownership of the majority of the stock of such corporation continues to be held by persons related to one another within the fourth degree of kindred or their spouses, and their landholdings are not increased, to either re-qualify as a family farm corporation or dissolve and return to personal ownership.

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence art action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment, Nebraska citizens and entities shall have standing in district court to seek enforcement.

The Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSON; TODD EHLER; and ROBERT E. BECK III Plaintiffs, v. JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska Defendants.	Case No. ___________ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

(Filed: 12/30/2004)

Plaintiffs state as follows:

NATURE OF ACTION

1. This action challenges the validity of Article XII, § 8 of the Nebraska Constitution under the United States Constitution and the Americans with Disabilities Act.

2. Article XII, § 8 of the Nebraska Constitution is commonly known as "Initiative 300" due to its origination as Initiative Measure 300.

3. Initiative 300 provides, in part; "No corporation or syndicate shall acquire, or otherwise obtain an interest,

whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching."

PARTIES

4. Plaintiff Jim Jones ("Jones") is an individual who resides at rural Eddyville, Nebraska. Jones is a rancher and a former Nebraska State Senator. Prior to 1982, Jones began his career as a farmer/rancher through forming a corporation with an older, established farmer. Jones has introduced and supported legislation in the Nebraska Legislature seeking to amend Nebraska law to provide increased opportunity for young Nebraskans to get started in farming and ranching.

5. Plaintiff Terrence M. Schumacher ("Schumacher") is a resident of Boulder, Colorado. Schumacher has an ownership interest in Nebraska farmland, some of which was originally purchased by his father.

6. Plaintiff Shad Dahlgren ("Dahlgren") is a resident of Lincoln, Nebraska. He owns a minority interest in a family farm corporation which operates a cattle feedlot located near Bertrand, Nebraska.

7. Plaintiff Harold G. Rickertsen ("Rickertsen") is an individual who resides in rural St. Paul, Nebraska.

8. Plaintiff Todd Ehler ("Ehler") is an individual who resides in Elkhorn, Nebraska. Ehler has been actively involved with a third generation family farm with his father. He has a disability as defined in the Americans with Disabilities Act.

9. Plaintiff Robert E. Beck III ("Beck") is an individual who resides in rural Kearney, Nebraska. Beck owns a commercial cattle feeding operation.

10. Defendant John Gale ("Secretary of State") is the Secretary of State of the State of Nebraska. Defendant Secretary of State is required to participate in the enforcement of Initiative 300. Specifically, the Secretary of State is required by Neb. Const. art. XII, § 8 to "monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and to notify the Attorney General of any possible violations."

11. Defendant Jon Bruning ("Attorney General") is the Attorney General of the State of Nebraska. Defendant Attorney General is authorized by Neb. Const. art. XII, § 8 to "commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of "Initiative 300."

JURISDICTION

12. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202. This action arises under the Constitution and laws of the United States. Plaintiffs seek a declaration that Initiative 300 (Neb. Const. art. XII, § 8) violates the Commerce Clause of the U.S. Constitution (Art. I, § 8); the Privileges and Immunities Clause of the U.S. Constitution (Art. IV, § 2); the Equal Protection Clause of the U.S. Constitution (Amend. XIV); 42 U.S.C. § 1983; and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213. Plaintiffs also request a permanent injunction prohibiting

enforcement of Initiative 300, as well as other appropriate relief, including attorneys' fees under 42 U.S.C. §§ 1988 and 12205.

VENUE

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1), as all the Defendants reside in the State of Nebraska or have an interest in property in the State of Nebraska. Venue is also proper in this district under 28 U.S.C. § 1391(b)(2) as the events giving rise to the claim occurred in this district and the property involved is located in this district.

BACKGROUND

Initiative 300

14. Article XII, § 8 of the Nebraska Constitution (hereafter "Initiative 300") originated as a constitutional amendment proposed through the initiative petition process. Initiative 300 appeared as a ballot question on the general election ballot in 1982.

15. In accordance with Nebraska law, a "ballot title" was prepared for Initiative 300 by the Nebraska Attorney General for placement on the ballot by the Secretary of State.

16. The purpose of a ballot title under Nebraska law is to "express the purpose of the measure" in up to one hundred words.

17. The ballot title submitted to Nebraska voters with regard to Initiative 300 stated as follows: "Shall a constitutional prohibition be created prohibiting ownership of

Nebraska farm or ranch land by any corporation, domestic or foreign, which is not a Nebraska family farm corporation . . . ?"

18. In accordance with Nebraska law an explanatory statement for Initiative 300 was also prepared by the Attorney General for placement on the official ballot, in italics, immediately preceding the ballot title.

19. The purpose of an explanatory statement under Nebraska law is to "explain the effect of a vote for and against the measure."

20. The explanatory statement presented to Nebraska voters for Initiative 300 stated: "A vote FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation. A vote AGAINST will reject such a constitutional restriction on ownership of Nebraska farm and ranch land."

21. In accordance with Nebraska law, the Secretary of State caused the ballot title and text of Initiative 300 to be published in all legal newspapers in the state once each week for three consecutive weeks preceding the 1982 general election.

22. Nebraska's current requirement for publication of informational pamphlets regarding initiated amendments had not been enacted at the time Initiative 300 was proposed.

23. At the time of Initiative 300's adoption in 1982, as today, Nebraska law provides a statutory process for any person who is dissatisfied with the ballot title provided by the Attorney General under which such person

may challenge the ballot title by filing a petition in the district court asking for a different title.

24. No legal challenge was filed to the ballot title for Initiative 300.

25. Initiative 300 was adopted by Nebraska voters, and it became part of the Nebraska Constitution on November 29, 1982 upon issuance of a proclamation by the Governor.

26. Initiative 300 generally prohibits corporations, limited partnerships, limited liability partnerships, partnerships with corporate members and similar business entities from owning Nebraska farm or ranch land or engaging in farming or ranching in the state of Nebraska. Initiative 300 defines farming and ranching as "the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping or feeding of animals for the production of livestock or livestock products."

27. Complete exemptions from Initiative 300's prohibitions concerning farming and ranching are provided to certain types of business entities including "family farm or ranch corporations," non-profit corporations, and Nebraska Indian tribal corporations.

28. Those entities which are not exempted from Initiative 300 are provided a number of exceptions to the ban on owning farm land or engaging in farming or ranching. These include exceptions for poultry production, alfalfa production on land leased by alfalfa processors, seed production, nursery plant production, sod production, research and experimental farming, holding of land for non-farm use for up to five years, custom spraying, custom

fertilizing, custom harvesting, livestock futures contracts, livestock purchased for slaughter, and livestock purchased and resold within two weeks.

29. An exemption from the farming ban is also provided for a fifty year period for a "family farm corporation" which ceases to meet the criteria for qualification as a family farm corporation. The exemption requires that majority ownership remain within the family, and the corporation may not increase its landholdings. A "grandfather" clause is also provided for land that was being used for farming by a corporation or syndicate as of the date of enactment of Initiative 300, provided that such land is held in continuous ownership by the same corporation or syndicate.

The Impact of Initiative 300 on the Plaintiffs

30. Plaintiff Jones has been actively engaged in farming and ranching in Nebraska for over forty years. From 1993 until January 2005 he also served as a Nebraska State Senator from the 43rd district, which covers 13 counties in the Nebraska Sandhills. Jones moved to Custer County Nebraska in 1963. He was able to get started in farming and ranching there by entering into an agreement with an unrelated older farmer/rancher in which he received fifty percent (50%) of the revenues. Jones provided his labor and the older farmer provided the land. In 1977 the two men formed a corporation and entered an agreement wherein Jones could purchase stock in the corporation each year, up to a maximum of forty-eight percent ownership (48%), so long as the older shareholder was living. In 1994, Jones purchased the remaining balance of the shares on contract. Jones and his family

now own all of the corporation's stock. This stock can be passed down to Jones' heirs. Initiative 300 precluded Jones from using this same business practice to help a younger farmer become established.

31. One of Jones' sons wanted to become established in farming through a similar arrangement with an older established farmer. However, he was prevented from forming this corporation by Initiative 300. The land in question was then sold, and the young potential farmer was shut out of starting a farming operation. As a state Senator, Jones introduced bills in the Nebraska Legislature to address such situations in order to provide young Nebraska farmers and ranchers increased opportunity to choose farming and ranching as a career. Jones bills were killed in committee, and opponents claimed the proposed legislation violated Initiative 300.

32. Plaintiff Schumacher is a resident of Boulder, Colorado. Schumacher has an ownership interest in Nebraska farmland that was originally purchased by his father. He desires to form a family limited partnership and transfer the farmland to this entity for improved management of the land, estate planning, and to better limit risk to the landowners, including Schumacher. However, pursuant to Initiative 300, Schumacher is prohibited from transferring the property to a family limited partnership because neither he nor any other family members reside on the farm land.

33. Plaintiff Schumacher's employment does not allow for him to live on the farmland, and he does not live close enough to the land to perform day to day labor and management.

34. Plaintiff Dahlgren owns a minority interest in a family farm corporation which operates a cattle feedlot located near Bertrand, Nebraska. Dahlgren was involved in an automobile accident at the age of 16. As a result of the accident, Dahlgren is a paraplegic which is a disability as defined by the ADA. Dahlgren's disability restricts him from performing the day to day labor necessary for the family farm corporation to operate its cattle feedlot. Due to Dahlgren's inability to provide the day to day labor necessary to operate the cattle feedlot, Initiative 300 prohibits Dahlgren from ever owning a majority interest in the family farm corporation, solely on the basis of his disability, unless he resides at the location of the cattle feedlot.

35. Plaintiff Rickertsen is an individual who resides in rural St. Paul, Nebraska. Upon his retirement he wanted to form a corporation with a young area farmer, but was prevented by Initiative 300 from doing so.

36. Plaintiff Ehler is an individual who resides in Elkhorn, Nebraska. Ehler has been actively involved with a third generation family farm with his father. He has a disability under the Americans with Disabilities Act. Ehler's disability restricts his ability to provide day to day labor on the family farm. Upon Ehler's father's retirement, Ehler would like to form a corporation with a neighboring farmer which would permit Ehler to continue to own and receive income off the farm. However, Initiative 300 prohibits Ehler from forming a corporation with his neighboring farmer who is not a family member.

37. Plaintiff Beck owns a commercial cattle feeding operation. He desires to engage in interstate commerce with non-resident customers. However, Initiative 300 prohibits Beck from conducting business with potential

customers in other states who wish to own cattle under a corporate entity or other "syndicate" (business entities) restricted by Initiative 300.

38. Enforcement of Initiative 300 by the Defendants will cause irreparable harm to the Plaintiffs for which no adequate remedy at law exists.

Count I

Initiative 300 Violates the Commerce Clause of the United States Constitution.

39. Plaintiffs re-allege paragraphs 1-38 of this Complaint as if fully set forth herein.

40. This Count seeks a declaration that Initiative 300 violates the Commerce Clause of the United States Constitution, (Art. I, § 8, cl. 3), and an injunction prohibiting enforcement of Initiative 300.

41. Initiative 300 was the model for South Dakota's Amendment E. Amendment E was held to violate the Commerce Clause by the United States Court of Appeals for the Eighth Circuit.

42. Initiative 300 purposefully discriminates against out-of-state interests, including out-of-state entities and individuals who transact business with the Plaintiffs.

43. The history of Initiative 300 demonstrates that it was motivated by economic protectionism and animus toward out-of-state businesses. The drafters of Initiative 300 intended to purposefully discriminate against out-of-state interests that wanted to do business in Nebraska. The drafters intended to ban farming in Nebraska by

out-of-state corporations and “syndicates” in order to protect perceived local interests.

44. Initiative 300 is facially discriminatory against interstate commerce. Only those persons who reside in Nebraska themselves or have family members residing in Nebraska may own a controlling interest in a corporation engaged in farming, ranching or ownerships of livestock in Nebraska. This limitation arises because Initiative 300 imposes qualifications for family farm corporate status that can be satisfied only when a family member resides on or provides day to day labor and management in Nebraska.

45. Initiative 300 is facially discriminatory against out-of-state Indian tribal corporations. Initiative 300 exempts “Nebraska Indian tribal corporations” but prohibits ownership of farm land or livestock by out-of-state Indian tribal corporations.

46. The plain language of Initiative 300 evidences an intent and purpose to prohibit absentee ownership and operation of farm and ranch land by corporate entities.

47. The plain language of Initiative 300 requires a shareholder of a family farm corporation to either reside on the farm property or participate in the physical labor attendant to the farm on a daily basis.

48. Initiative 300 facially discriminates against out-of-state commence by imposing greater burdens on out-of-state residents.

49. Initiative 300 creates a disparate impact on out-of-state residents and on interstate commerce by its plain language, its purpose and its effect, due to the residency

and daily labor requirement for qualification as a family farm corporation.

50. The burden which Initiative 300 imposes in interstate commerce is excessive in relation to its putative local benefits.

51. The discriminatory effect of Initiative 300 is to unlawfully burden interstate commerce.

Count II

Initiative 300 Violates the Privileges and Immunities Clause of the U.S. Constitution.

52. Plaintiffs reallege Paragraphs 1-38 of this Complaint as if fully set forth herein.

53. This Count seeks a declaration that Initiative 300 violates the Privileges and Immunities Clause of Art. IV, § 2 of the U.S. Constitution, and an injunction prohibiting enforcement of Initiative 300.

54. Plaintiff Schumacher is an individual citizen of the state of Colorado and is not a resident of Nebraska.

55. Plaintiff Schumacher is not related to a person residing on or actively engaged in the day to day labor and management of a farm or ranch located in Nebraska.

56. Plaintiff Schumacher's occupation, activities and investments constitute a business activity or "common calling" protected by Art. IV, § 2 of the U.S. Constitution against discrimination or unequal treatment by Defendants.

57. Although Art. XII, § 8(A) of the Constitution of the State of Nebraska provides a "family farm or ranch

corporation" exception to Initiative 300's prohibition against corporate or syndicate farming or ranching in Nebraska, Initiative 300 on its face and in effect prohibits Plaintiff Schumacher, and other non-residents of the state of Nebraska, from qualifying for this exception and the remaining exceptions thereunder.

58. The plain language, effect, and enforcement of Initiative 300 discriminates against Plaintiff Schumacher, and other non-residents of the state of Nebraska, on the basis of his citizenship or residency in violation of Art. IV, § 2 of the Constitution.

59. The exceptions to Initiative 300's general prohibition against corporate or syndicate farming or ranching in Nebraska grant privileges to residents of the state of Nebraska not available to Plaintiff Schumacher, and other non-residents of Nebraska, on the basis of his citizenship or residency in violation of Art. IV, § 2 of the U.S. Constitution.

60. Initiative 300 unconstitutionally differentiates between residents of Nebraska and non-residents of Nebraska and deprives Plaintiff Schumacher of the same privileges enjoyed by the residents of Nebraska in violation of Art. IV, § 2 of the U.S. Constitution.

61. An actual controversy exists between Plaintiff Schumacher and Defendants as to the constitutionality of Initiative 300.

Count III

Initiative 300 Violates the Equal Protection Clause of the Fourteenth Amendment.

62. Plaintiffs reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

63. This Count seeks a declaration that Initiative 300 violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the Untied States. It also seeks an injunction prohibiting enforcement of Initiative 300.

64. Initiative 300, on its face and in its purpose and effect, treats similarly situated individuals differently, affording to some corporations, syndicates and other persons the opportunity to farm and own livestock in Nebraska, while denying this opportunity to others.

65. Initiative 300 discriminates against non-resident family corporations.

66. The classifications in Initiative 300 have no substantial relationship to an important government interest and bear no rational relationship to a legitimate governmental end.

67. The Plaintiffs' ability to enter into business with non-resident family corporations and/or to form such entities for farming purposes is restricted by Initiative 300.

68. Plaintiffs are accorded unfavorable treatment under the classifications contained in Initiative 300.

69. Initiative 300 denies Plaintiffs equal protection of the law in violation of the Equal Protection Clause.

70. An actual controversy exists between the parties as to the constitutionality of Initiative 300.

71. The particular classifications in Initiative 300 challenged in this Count have not previously been adjudicated in any reported decision.

Count IV

Initiative 300 Deprives Plaintiffs of Rights Guaranteed Under the U.S. Constitution in Violation of 42 U.S.C. § 1983.

72. Plaintiffs reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

73. This Count is brought by Plaintiffs pursuant to 42 U.S.C. §§ 1983 and 1988, against the Secretary of State and Attorney General in their official capacities, and seeks a declaration that Initiative 300 deprives Plaintiffs of rights guaranteed by the United States Constitution. It also seeks prospective injunctive relief restraining the enforcement of Initiative 300.

74. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

75. The Commerce Clause, the Privileges and Immunities Clause of Art. IV, § 2, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution confer rights, privileges, or immunities within the meaning of 42 U.S.C. § 1983.

76. As more fully alleged above, the Secretary of State and Attorney General, by virtue of their constitutional duties under Initiative 300, are denying Plaintiffs rights secured by the Commerce Clause, Privileges and Immunities Clause, and the Equal Protection Clause. In so doing, the Secretary of State and the Attorney General are acting under color of law.

77. An actual controversy exists between the parties as to the constitutionality of Initiative 300.

Count V

Initiative 300 Violates the Americans with Disabilities Act.

78. Plaintiffs Ehler and Dahlgren reallege paragraphs 1-38 of this Complaint as if fully set forth herein.

79. This Count seeks a declaration that Initiative 300 violates the ADA, 42 U.S.C. § 12101-12213, and an injunction against enforcement of Initiative 300.

80. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. Title II is a catch-all provision that prohibits all discrimination by a public entity,

regardless of the context. Title II applies to anything a public entity does.

81. Defendants are "public entities" under 42 U.S.C. § 12131 and are responsible for administering and enforcing Initiative 300.

82. Initiative 300 requires that at least one of the family members of the family farm corporation "reside on or be actively engaged in the day-to-day labor and management of the farm." Neb. Const. Art. XII, § 8. The Nebraska Supreme Court has held this provision requires participation in the physical labor attendant to the farm or ranch on a daily basis.

83. Initiative 300 discriminates on its face against disabled persons who cannot satisfy the day to day labor qualification. These disabled farmers are discriminated against because, solely as a result of their disabilities, they are deprived of the opportunity to own a majority interest of a family farm corporation or syndicate without residing on the farm. This opportunity is available to non-disabled persons.

84. Initiative 300 is a state constitutional provision which conflicts with federal law. Thus, Initiative 300 is preempted under the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2.

85. Initiative 300 actually conflicts with federal law, since it is impossible for the State of Nebraska to comply with both Initiative 300 and the ADA. In addition, Initiative 300 stands as an obstacle to the full purposes and objectives of Congress.

86. An actual controversy exists between the parties as to whether Initiative 300 violates the ADA.

WHEREFORE, Plaintiffs request this Court to render judgment on this Complaint in their favor and grant the following relief:

A. Declare that Initiative 300 interferes with interstate commerce in violation of the Commerce Clause of the United States Constitution;

B. Declare that Initiative 300 violates the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution;

C. Declare that Initiative 300 deprives Plaintiffs of the equal protection of the law in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

D. Declare that the Secretary of State and Attorney General, by virtue of fulfilling the duties of their offices under Initiative 300, are depriving Plaintiffs of their rights under the Commerce Clause, Privileges and Immunities Clause, and Equal Protection Clause in violation of 42 U.S.C. § 1983;

E. Declare that Initiative 300 violates the Americans with Disabilities Act;

F. Enter an order permanently enjoining the Defendants from enforcing, or taking any steps to enforce, Initiative 300;

G. Award Plaintiffs their costs incurred in this action, including reasonable attorneys' fees, as permitted by 42 U.S.C. §§ 1983, 1988, and 12205; and

H. Grant Plaintiffs such additional and further relief as this Court deems just and proper.

DATED this 30th day of December, 2004.

Respectfully submitted,

JIM JONES, TERRENCE M. SCHUMACHER; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III, Plaintiffs

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al., **Plaintiffs,** **v.** **JOHN GALE, et al.,** **Defendants.**	)	**Case No. 8:04CV645** **DECLARATION OF NEIL OXTON**
JOHN W. DECAMP, et al., **Plaintiffs,** **v.** **STATE OF NEBRASKA, et al.,** **Defendants.**	)	**Case No. 4:04CV3194**

(Filed Sept. 30, 2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, Neil Oxton, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am a resident of Lincoln, Nebraska. I have lived in Nebraska since 1968.

3. I was formerly an employee of the Farmers Union, either of the national office or of the state office.

4. On January I, 1978, I became President of Farmers Union of Nebraska, and at all times relevant herein I held that position.

5. Farmers Union of Nebraska is a general farm organization composed of Nebraska farmers, some of whom work land owned by corporations in which they have controlling interest.

6. For the past thirty years, I have held the belief that the workers of farm and ranch land should enjoy the rights and responsibilities inherent in the ownership of the land and that the separation of land and ownership from the person working the land creates social and economic evils.

7. Because of that belief, I have stood in opposition during the past thirty years to corporate ownership of farm and ranch land, unless the corporation be one in which the majority of voting stock is held by the farm or ranch families working the land.

8. I label the former land-owning corporation as the "non-family corporation" and the latter land-owning corporation as the "family-farm corporation".

9. Since 1968, I have actively supported legislation to restrict non-family corporate ownership and operation of Nebraska farm and ranch land.

10. I have attended no less than twelve public hearings before Committees of the Nebraska Legislature taking testimony on bills to restrict non-family corporate ownership and operation of Nebraska farm and ranch land.

11. I have heard individuals testify in support of such proposed legislation.

12. I myself have testified in support of such legislation.

13. Following is a statement I made in 1979 to the Constitutional Revision and Recreation Committee of the Nebraska Legislature on LB 191, 1979 Session, to place before the voters a proposed constitutional amendment to restrict in Nebraska non-family corporate ownership and operation of farm and ranch land:

> "Farmers Union joins other farm organizations in coming before the Constitutional Revision and Recreation Committee of the Nebraska Legislature to ask protection from the economic power of corporate investments and the threat it poses to Nebraska farmers. For years we have been denied legislation, with legislators killing such restrictions. We are told that corporation farming is no problem in Nebraska. This after the poultry industry has been lost, while cattle feeding is moving from family feeders to large incorporated custom feed lots, as hogs are moving to the factory, and while increasing acres of land are drifting to corporate control. We've been told that this legislation would restrict the right of family farmers to incorporate. This is simply not true. The law would clearly exempt family farm corporations using a broad definition. We've been told the legislation we offer is unconstitutional. Meanwhile, other states with nearly identical constitutions have enacted nearly identical prohibitions of corporate farming, prohibitions which have been upheld by state and federal courts. We have been told that this legislation is a violation of free enterprise and that its passage

will sacrifice efficiency, but this law seeks to preserve free enterprise, the system of many independent units. One percent of the nation's feed lots, two-thirds of the nation's fat cattle. Where are our many cattle feeders? Other states have a problem now with large custom feeders, and Nebraska will inherit this problem too if we don't take steps to prevent it now. What is happening to the right of opportunity for those who are willing to work hard? What opportunity will exist to farmers in future years when the rest of agriculture comes under corporate control? Where is the efficiency we are told would be lost if we outlawed corporation farming? In the report, *Another Look at Economics of Size in Cattle Feeding*, USDA economist Ralph Johnson, located right here in Lincoln, tells us that the very large custom feed lots are no more economical producers than smaller family feeders. In the study of economics of size in swine production under different production methods and phases, Iowa State University researches found little cost advantages in large hog factories, even when using an unrealistically large litter size of over 10 pigs per sow. A South Dakota State University study showed feeding hogs in confinement, a growing challenge for corporate investments in Nebraska, yield slower rate of gain, than much more elaborate systems, so it is clearly not efficiency that is fueling the trend to large corporate farm operations but rather economic and political power. The trend to absentee ownership of land is being brought about not by efficiency in using hired help to operate a farm but by economic power of a corporation to command large amounts of money and credit needed to buy land today. Tax law allows investors in hog confinements to recover over half their investments the

> first year in tax savings. The federal tax laws are at the root of much of this trend and are the result of the political power and influence of the wealth of the corporations. This influence is the real reason that the farmers of Nebraska have for years been denied protection from corporate farming. The Legislature's refusal to pass this legislation is not in defense of incorporated family farms, the Constitution, free enterprise, or efficiency. It is in defense of corporate interests."

14. I cite the foregoing statement of mine to the Constitutional Revision and Recreation Committee of the Nebraska Legislature not for the truth of the facts set forth therein but rather as an expression of my belief that social and economic evils attended non-family corporate ownership and operation of Nebraska farm and ranch land.

15. In December 1981, the delegates to the annual convention of the Farmers Union of Nebraska voted to draft and circulate an initiative petition to place before the voters an amendment to the Nebraska Constitution to restrict non-family corporate ownership and operation of farm and ranch land in Nebraska.

16. Because of this decision and my position with Farmers Union of Nebraska, I assumed the leadership responsibility for the drafting of the initiative petition, the recruitment and training of petition circulators, and the acquisition of the requisite number of signers to the petition so that the issue would be placed on the November 1982 ballot.

17. In drafting the initiative petition, I worked with several individuals interested in restricting non-family

corporate ownership and operation of farm and ranch land in Nebraska.

18. We completed drafting the initiative petition in February 1982.

19. After the initiative petition was drafted, it was necessary to find people throughout the State of Nebraska who would circulate the initiative petition.

20. To that end, in addition to the Nebraska Farmer Union's organization, I sought support from other organizations in Nebraska for the names and addresses of people who might serve as circulators. Organizations and associations I contacted for help included the Nebraska Grange, the Nebraska chapter of the National Farm Organization, the Nebraska Woolgrowers Association, the Nebraska Wheat Growers Association, the Nebraska Association of Farmer Elected Committeemen, the Center for Rural Affairs, Catholic Rural Life Conference, Women Involved in Farm Economics, Nebraska Synod of the American Lutheran Church, and the Nebraska Conference of the United Methodist Church.

21. These organizations and associations arranged meetings throughout the State of Nebraska to be attended by members of the organizations and associations, as well as by other persons interested in restricting non-family corporate ownership and operation of Nebraska farm and ranch land.

22. I attended at least 75 such meetings between March and June 1982.

23. At the meetings I attended I explained my perceptions of the social economic evils inherent in non-family

corporate ownership and operation of Nebraska farm and ranch land.

24. Many persons in attendance expressed to me a similar belief.

25. As a result of the many meetings conducted in early 1982 throughout Nebraska, as set forth above, I located over 1,700 qualified Nebraska voters who agreed to circulate the initiative petition for signature by voters.

26. The initiative petition contained the following pertinent language:

> "The object of this initiative petition is to prohibit non-family farm corporations from further purchase of Nebraska farm and ranch land and to prohibit further establishment of non-family corporate crop and livestock operations."
>
> . . .
>
> "___ being first duly sworn ___ deposes and says that he (she) is the circulator of the foregoing petition containing ___ signatures;
>
> . . .
>
> That the affiant stated to each petitioner before he affixed his signature the legal effect and nature of such petition."

27. So that each circulator could know the legal effect and nature of the petition, I explained at each of the aforesaid meetings the social and economic evils of non-family corporate ownership and operation of farm and ranchland in Nebraska that I believed the petition was designed to address and the legal effect and nature of the petition.

28. In June 1982, I submitted signed initiative petitions to the Secretary of State for the State of Nebraska containing 62,536 signatures. The Secretary of State determined that 56,636 qualified voters signed the petitions, certified the petition for the November 1982 ballot and denominated the same as Initiative 300.

29. During this time I heard hundreds of Nebraska residents express various social and economic evils they perceived to be created by the rise of non-family corporate ownership and operation of farm and ranch land in Nebraska.

30. Among the expressions I received were the following:

(a) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor;

(b) Increased absentee ownership of farm and ranch lands in Nebraska with such increase adversely affecting stewardship and preservation of soil, water, and other natural resources;

(c) Increased tenant operation of farms and ranches in Nebraska with such increase adversely affecting participation in local government and voluntary associational activity;

(d) Erosion of traditional agricultural cash markets through production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers;

(e) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations;

(f) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point or origin by non-family farm and ranch corporations;

(g) Ability of non-family farms and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

31. While I make no claims for the truth or falsity of aforesaid expressions of perceived social and economic evils attendant upon the rise of non-family corporate ownership and operation of Nebraska farm and ranch land, such expressions were made, and to the best of my knowledge, represented the beliefs of the speakers that social and economic evils were attendant upon the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska.

32. Based on my personal knowledge, from 1968 through 1982, hundreds of Nebraska residents and dozens of organizations or associations of Nebraska residents supported legislation in the Nebraska legislature to address perceived social and economic evils resulting from the ownership and operation of Nebraska farm and ranch land by non-family corporation.

33. Based on my personal knowledge, no fewer than ten organizations or associations of Nebraska residents and no fewer than 1700 Nebraska residents participated

in those initiating activities designed to place Initiative 300 on the ballot and gathered support form 56,636 qualified Nebraska voters to place Initiative 300 on the ballot.

34. Based on my personal knowledge, many of the foregoing initiated Initiative 300 to address perceived social and economic evils resulting from the ownership and operation of Nebraska farm and randh land by non-family corporations.

35. To my personal knowledge, either individually or in my capacity as President of Nebraska Farmers Union, Exhibits Nos. 1 through 13 attached hereto and incorporated herein by reference, are true and correct copies of documents used to analyze, review, prepare and/or promote Initiative 300.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28th day of September, 2005.

/s/ Neil Oxton
Neil Oxton

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al., **Plaintiffs,** **v.** **JOHN GALE, et al.,** **Defendants.**	**Case No. 8:04CV645** **DECLARATION OF GEORGE WILLIAM BURROWS**
JOHN W. DECAMP, et al., **Plaintiffs,** **v.** **STATE OF NEBRASKA, et al.,** **Defendants.**	**Case No. 4:04CV3194**

(Filed 9/30/2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, George William Burrows, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am a retired farmer and land owner in Gage County, Nebraska.

3. In 1974, I was elected from the 30th Legislative District to the Nebraska Legislature. I served as State

Senator in the Nebraska Legislature from 1975 through 1982.

4. In the early 1960's, I became concerned over what I thought to be a rise in ownership of Nebraska farm and ranch land by corporations.

5. In my view, corporate ownership of farm and ranch land divorced those persons working the land from the rights and responsibilities of ownership of the land.

6. I believed then and continue to believe today that the workers of farm and ranch land should enjoy the rights and responsibilities inherent in the ownership of the land and that the separation of land ownership from the persons working the land creates social and economic evils.

7. In the early 1960's, I knew that some farm and ranch families, including my own family, had formed corporations in which they held the majority of the stock, thereby retaining control of the corporations, and had deeded the farm or ranch land they were working to such corporations. I labeled this kind of corporation as the "family farm corporation".

8. I did not then believe and I do not believe today that any social and economic evils attended such form of land ownership because the individual who controlled the family farm corporation were actually working the land.

9. I believed in the early 1970's that some forms of farm and ranch operations, such as chicken production, were already controlled by non-family farm corporations.

10. I deplored this development, as I understood it to exist, and hoped no similar patterns would occur in other types of farming or ranching operations.

11. Because of my beliefs, I determined to use my power as a state legislator to propose legislation that would restrict non-family farm corporate ownership and operation of farm and ranch land in Nebraska.

12. To that end, during my eight years as a state senator, I prepared and introduced the following Bills in the Nebraska Legislature regarding non-family farm corporate ownership of farm and ranch land in Nebraska:

(i) LB 363, 1975, for an Act relating to agriculture; to declare intent; to define terms; to provide that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide penalties.

(ii) LB 857, 1978, for an Act relating to real property; to place certain restrictions on tax exempt pension, profit sharing, or stock bonus trusts as prescribed.

(iii) LB 190, 1979, for an Act relating to agriculture; to declare intent; to define terms; to provide that no corporations shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide penalties.

(iv) LB 191, 1979, for an Act for submission to the electors of an ammendment to Article XII of the Constitution of Nebraska, relating to miscellaneous corporations by adding thereto a new Section 8; to require the Legislature to restrict the ownership of land used for agriculture purposes; to provide for the time and manner of submission and form of ballot; and to provide the effective date thereof.

(v) LB 837, 1980, for an Act relating to agriculture; to declare intent to define terms; to provided that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide for enforcement.

(vi) LB 184, 1981, for an Act related to agriculture; to declare intent; to define terms; to provide that no corporation shall engage in farming operations except as authorized; to require reports of farming operations as prescribed; and to provide for enforcement.

13. Each of the foregoing bills was subjected to a public hearing in the Legislature.

14. I attended the public hearing on each of the foregoing Bills.

15. Nebraska residents provided supportive testimony for each of the measures that I introduced to restrict corporate ownership of farm and ranch land in Nebraska. Each supportive witness stated that he or she perceived a social or economic evil attendant in the rise of non-family corporate ownership and operation of farm or ranch land in Nebraska.

16. Among the witnesses' expressions of social and economic evils they perceived to be created by the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska were the following:

(i) Unfair economic competition for farm and ranch acquisition favoring the collective wealth of the non-family farm or ranch corporation and disfavoring the individual wealth of the sole proprietor;

(ii) Increased absentee ownership of farm and ranch lands in Nebraska with such increase adversely affecting stewardship and preservation of soil, water, and other natural resources;

(iii) Increased tenant operation of farms and ranches in Nebraska with such increase adversely affecting participation in local government and voluntary associational activity;

(iv) Erosion of agricultural markets free of production, selling, and buying decisions of vertically organized large scale non-family farm and ranch corporate agricultural producers;

(v) Depopulation of rural areas through large-scale holdings of land by non-family farm and ranch corporations requiring fewer laborers to operate;

(vi) Depopulation of rural towns through erosion of local markets for agricultural products and supplies, resulting from large-scale bulk purchases at point of origin by non-family farm and ranch corporations;

(vii) Ability of non-family farm and ranch corporations to hold land in perpetuity, rather than for the natural life of an individual, thereby diminishing the frequency of transmission of land from one owner to another.

17. In addition, because of my continued advocacy of restrictions on non-family corporate ownership and operation of farm and ranch land in Nebraska I conversed with many Nebraska residents over my eight years as a state legislator about their perceptions of social and economic

evils attendant upon non-family corporate ownership and operation of farm and ranch land in Nebraska.

18. The individuals expressed to me their belief that non-family corporate ownership and operation of Nebraska farm and ranch land was fraught with social and economic evils for the state. Among their expressions of social and economic evils they perceived to be created by the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska were the same kinds of expressions that I have set forth in the preceding paragraph.

19. While I cannot vouch for the truth or falsity for the aforesaid expressions of perceived social and economic evils, such expression were made as stated and, to the best of my knowledge, represented the speakers' beliefs that social and economic evils attended the rise in non-family corporate ownership and operation of farm and ranch land in Nebraska.

20. At no time during my tenure as a state senator did any of the foregoing bills addressing non-family corporate ownership and operation of farm and ranch land in Nebraska pass in the Nebraska Legislature.

21. During my eight years as a state senator, Attorney General Paul Douglas rendered to the Nebraska Legislature advisory opinions on legislation to restrict non-family corporate ownership and operation of farm and ranch land in Nebraska.

22. Regarding my last restrictive Bill, LB 184, 1981 Session, Douglas stated in pertinent part as follows:

> "This office has issued numerous opinions on bills nearly identical or similar to LB 184 over the past several years. *See, Report of the Attorney*

> *General 1971-1972,* No. 86 at page 201 and No. 118 at page 275, *Report of the Attorney General, 1973-1974,* No. 116 at page 159, *Report of the Attorney General, 1975-1976,* No. 5 at page 5 and No. 40 at page 43, *Report of the Attorney General, 1977-1978,* No. 44 at page 62 and No. 172 at page 258. We have attached copies of two of the more recent of these opinions to this letter for you reference.
>
> In all of the opinions cited above, this office has repeatedly stated that legislation similar or identical to LB 184 is of suspect constitutional validity. We have variously stated that this type of legislation involves an improper and invalid legislative classification of corporations, that this type of legislation involves an improper overextension of the Legislature's police power, and that this type of legislation is in contravention of Article XII, Section I, and Article III, Section 18 of the Nebraska Constitution pertaining to special laws. We have reviewed LB 184 in light of our various earlier opinions and we have determined that LB 184 raised the same constitutional concerns as we expressed earlier."

23. As I worked to obtain votes from my colleagues in the state legislature in support of my legislation to restrict non-family corporate ownership of farm and ranch land in Nebraska, some of my colleagues told me that they could not vote for the legislation because if was constitutionally suspect.

24. I do not vouch for the truth or falsity of the remarks nor of the opinions of Attorney General Paul Douglas, but the remarks were made and the opinions rendered.

25. In January 1982, I learned that the Nebraska Farmers Union was preparing an initiative petition to circulate among voters in Nebraska to place on the ballot a constitution amendment to restrict non-family farm corporate ownership and operation of Nebraska farm and ranch land.

26. Because I had been unsuccessful in the Legislature with both proposed legislation and a constitutional amendment, I concluded that the initiative route was the only avenue available to address the perceived social and economic evils attendant upon non-family corporate ownership and operation of farm and ranch land in Nebraska and that the initiative petition and the circulation thereof.

27. On September 15, 1982, the Legislature's Banking, Commerce and Insurance Committee conducted the only formal public hearing on Initiative 300.

28. I was the only proponent on Initiative 300 to speak at the public hearing on September 15, 1982.

29. I made the following statements to the Committee on September 15, 1982, of the perceived social and economic evils I saw Initiative 300 as addressing:

> "Whether we as a state want family farms as a choice, or whether we want to allow large corporations to buy the farm land in the State of Nebraska and turn it into perpetual concentrated ownership where the individual can no longer get it back. Most of our forefathers came into this country and many of them in the middle west to get away from European systems where a few large land owners owned things, where perpetually they count not get a piece of the action. A

> part of the capitalism, capitalism that was referred to as ownership by the people, where they could have a piece of the action. This is true capitalism – corporations are different than individuals as they concentrate their purchase of land. They never die, and that ownership is perpetual."
>
> "The historical evidence that the family farm operation is the most efficient for the consumer, the producer, whenever it is used, family farm operation, where there is incentive there to produce more. The only efficiency the large outside corporations have shown are those that are of economic power, monopolistic power to set their prices if they gain control of the product and possibly other powers in tax evasion and so forth, advantages which are detrimental to the people of the state."

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28 day of September, 2005.

/s/ George William Burrows
George William Burrows

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JIM JONES, et al.,
Plaintiffs,
v.
JOHN GALE, et al.,
Defendants.

Case No. 8:04CV645

DECLARATION OF CHUCK HASSEBROOK

JOHN W. DECAMP, et al.,
Plaintiffs,
v.
STATE OF NEBRASKA, et al.,
Defendants.

Case No. 4:04CV3194

(Filed Sept. 30, 2005)

STATE OF NEBRASKA)
) ss.
LANCASTER COUNTY)

I, Chuck Hassebrook, declare as follows:

1. The facts set forth in this declaration are personally known to me. I suffer from no disability and I am competent to testify regarding the matters set forth herein. I am over 21 years of age.

2. I am currently Executive Director for the Center for Rural Affairs, Inc.

3. The Center for Rural Affairs ("CFRA") is a private, non-profit organization incorporated under the laws of the

State of Nebraska. CFRA is headquartered in Lyons, Nebraska.

4. CRFA was founded in 1973 with a mission to establish strong rural communities, social and economic justice, environmental stewardship, and genuine opportunity for all while engaging people in decisions that affect the quality of their lives and the future of their communities.

5. In the years 1981 and 1982, I was on staff with the CFRA as a Field Organizer. At that time my duties included researching corporate farming, farm credit and farm taxation along with drafting policy and legislative proposals in those and other areas.

6. In the years 1981 and 1982, Drey Samuelson was on the staff of the Nebraska Farmers Union ("NFU"), a general farm organization, as an assistant to the president of NFU.

7. In late 1981 or early 1982, Drey Samuelson and I were asked by Neil Oxton, who at that time was President of NFU, to draft language for a proposed constitutional amendment to restrict corporate farming, which later became Initiative 300.

8. As I had a strong background in researching corporate farming in my position with CFRA, along with my knowledge of agricultural business structures, I played the lead role in drafting the language of Initiative 300.

9. A group of representatives from supportive organizations formed the Committee to Preserve the Family Farm ("Committee") to help guide our efforts in drafting Initiative 300. The Committee included representatives from such organizations as the NFU, CFRA, Women

Involved in Farm Economics ("WIFE"), and Nebraska Grange.

10. The Committee, along with Dr. James Lake, a constitutional law professor at the University of Nebraska College of Law, reviewed and commented on our drafts.

11. Dr. James Lake provided guidance on critical decisions in drafting the proposed language of Initiative 300.

12. As a starting point in the drafting of Initiative 300 we used LB 184, a 1981 legislative bill introduced by then State Senator Bill Burrows.

13. Extensive changes were made to the legislative bill that Senator Burrows introduced.

14. These changes were made based upon our knowledge of corporate farming and research of similar laws from other states.

15. During the drafting of Initiative 300, I relied upon my knowledge of corporate farming which I had gained, in part, from the research I completed when I helped draft the 1979 version of a series of CFRA reports entitled "Who Will Sit Up With the Corporate Sow?: A Report On Vertical Integration And Large Scale Hog Production In Nebraska" ("Corporate Sow").

16. The Corporate Sow reports are attached hereto and incorporated herein by reference as Attachment 22 and 23.

17. Corporate Sow concluded:

a. The percentage of Nebraska's pig crop farrowed in hog factories has tripled – increasing

> from seven percent in 1974 to the 24% figure today (ie 1979).
>
> b. Although many of the hog factories are still owned primarily by farmers, they are increasingly owned by non-farm investors and corporations involved in other farming operations. . . .
>
> c. The largest current scheme to bring non-farm money into Nebraska hog confinement is apparently the brainchild of Sand Livestock Systems of Columbus, Nebraska – the nation's largest builder of hog confinement. Sand personnel and Columbus business people are the primary owners of at least four of five 480-sow farrowing complexes overlooking the Platte River Valley from it southern bluffs nea Shelby, Nebraska.

18. I also studied the 1976 Center for Rural Affairs report "Wheels of Fortune" ("WOF").

19. WOF is attached hereto and incorporated herein by reference as Attachment 20.

20. WOF documented that absentee and corporate investors owned over 25 percent of irrigated land in Holt County and nearly 30 percent of irrigated land in Dundy County. These investors and corporations included both Nebraskans and non-Nebraskans.

21. Of Holt County, the WOF report said, "The absentee owners are mainly Nebraskans primarily engaged in business pursuits other than farming."

22. Both reports, Corporate Sow and WOF, demonstrated our concern over growing control of agriculture by both Nebraska and non-Nebraska investors and corporations.

23. I also had extensive knowledge of other states' laws in effect at the time c the drafting of Initiative 300.

24. I had reviewed the United States Department of Agriculture's report "Stat Regulation of Corporate Farming" written by Thomas D Edmondson and Kenneth R. Kruse (Agricultural Economic Report No. 419, December 1978), which the CFRA had in its possession at the time we were drafting Initiative 300.

25. The "State Regulation of Corporate Farming" report is attached hereto and incorporated herein by reference as Attachment 21.

26. In drafting Initiative 300, I was determined to ensure that it would be effective – more effective than other states laws – against the growth in corporate farming by groups of investors such as we had documented in Nebraska.

27. In my experience and based on my personal knowledge, these investor corporations were very often Nebraska corporations with predominantly Nebraska stockholders.

28. I was determined that we write an amendment that would restrict these types of corporations.

29. My view was, and remains, that the corporate form of business was created by government to confer the advantages of limited liability and reduced taxes on certain businesses.

30. My intent was to limit the use of the corporate vehicle to the most socially beneficial form of farming: family farming, where the family that lives on or works the farm also owns and controls the operation.

31. Such restrictions are also beneficial because as persons laboring on the farm are family members, rather than members of another social class, management-labor relations can be expected to be more egalitarian and less exploitive and also because land is a family heirloom to be passed onto future generations, family members will be motivated to preserve it beyond rational economic planning horizons.

32. My intent in drafting Initiative 300 was to restrict use of the corporate vehicle by farm structures where ownership, labor and management were performed by different people, composing distinct social classes. To me, it made no difference whether such operations were owned by Columbus, Nebraska investors or New York, New York investors. My intent was to deny them the advantages conferred by government through the corporate form of business.

33. In my view, other states laws were ineffective in this regard because of their exemptions for authorized farm corporations – generally corporations owned by a limited number of stockholders.

34. Consequently, I struck the authorized farm corporation provision that was included in proposed legislation used as our starting point.

35. I had no interest in other variations of the authorized farm corporation.

36. Although some states, such as Kansas at that time, included an exemption for authorized farm corporations, the exemption only applied if all the incorporators were from that state, i.e. all the incorporators had to be from Kansas.

37. The use of such exemptions effectively targeted the restrictions at corporations controlled by out of state interests. ("State Regulation of Corporate Farming" (Agricultural Economic Report No. 419, December 1978). Therefore, we rejected that approach.

38. I was not interested in restricting only non-Nebraskans, so we included no language in the amendment to distinguish between Nebraska investors and investors from other states.

39. We also included no language to distinguish between Nebraska family farms and family farms based in other states. We did so consciously and intentionally.

40. As stated above, although I was one of the lead drafters of Initiative 300, decisions on these issues were shared among the Committee.

41. Each major decision about the drafting of the amendment was brought before the Committee and the Committee concurred with the decision to include no exemption for authorized farm corporations and make no distinction between Nebraska and non-Nebraska corporations or Nebraska and non-Nebraska investors.

42. The Committee was united in its determination and intent to prevent uninvolved investors from undermining the family farm structure of agriculture, irrespective of whether those investors lived in or out of Nebraska.

43. During the campaign for Initiative 300, I was a member of the circle of people developing strategy for the campaign – also including Neil Oxton, Marty Strange and Drey Samuelson.

44. From the outset, I anticipated that we would be heavily outspent by the opposition. Our strategy was to make an issue of corporate farming interests using their money to buy votes.

45. On the day spending reports were due to the Nebraska Accountability and Disclosure Commission, Drey Samuelson was literally sitting in the Commission lobby waiting for the spending and fundraising report of the opposition.

46. We were surprised and frankly elated to learn of the heavy dependence of the opposition on donations from large out of state interests, especially Prudential. That elevated our focus on out of state money in the campaign.

47. We believed that most voters would believe that Nebraska policy should be set by Nebraskans, rather than out of state companies pursuing their vested interests in the state.

48. Therefore, the closing weeks of the campaign included a focus on out of state interests buying votes, not because we were trying to discriminate against out of state commerce but rather, because we were drawing attention to an attempt by out of state interests to intervene in Nebraskans' decision.

49. Furthermore, I grew up at rural Platte Center Nebraska.

50. Plaintiff Terrence Schumacher is also a Platte Center native. Terrence's brother Tim Schumacher and his father Matt Schumacher live in Platte Center, at the center of Platte County, where some of the Schumacher family land is located.

51. The Schumacher farm is located within a few miles of the residence of Matt and Tim Schumacher.

52. To my personal knowledge, Exhibits Nos. 1 through 23, attached hereto and incorporated herein by reference, are true and correct copies of documents that I, and other individuals and organizations, used in researching how to draft Initiative 300 and documents that were used to analyze, review, prepare and/or promote Initiative 300.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28 day of September, 2005.

/s/ Chuck Hassebrook
Chuck Hassebrook